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WM. R. STANSBURY
CLERK

Supreme Court of the United States.

October Term, 1921.

No. 21 Original.

In the Matter

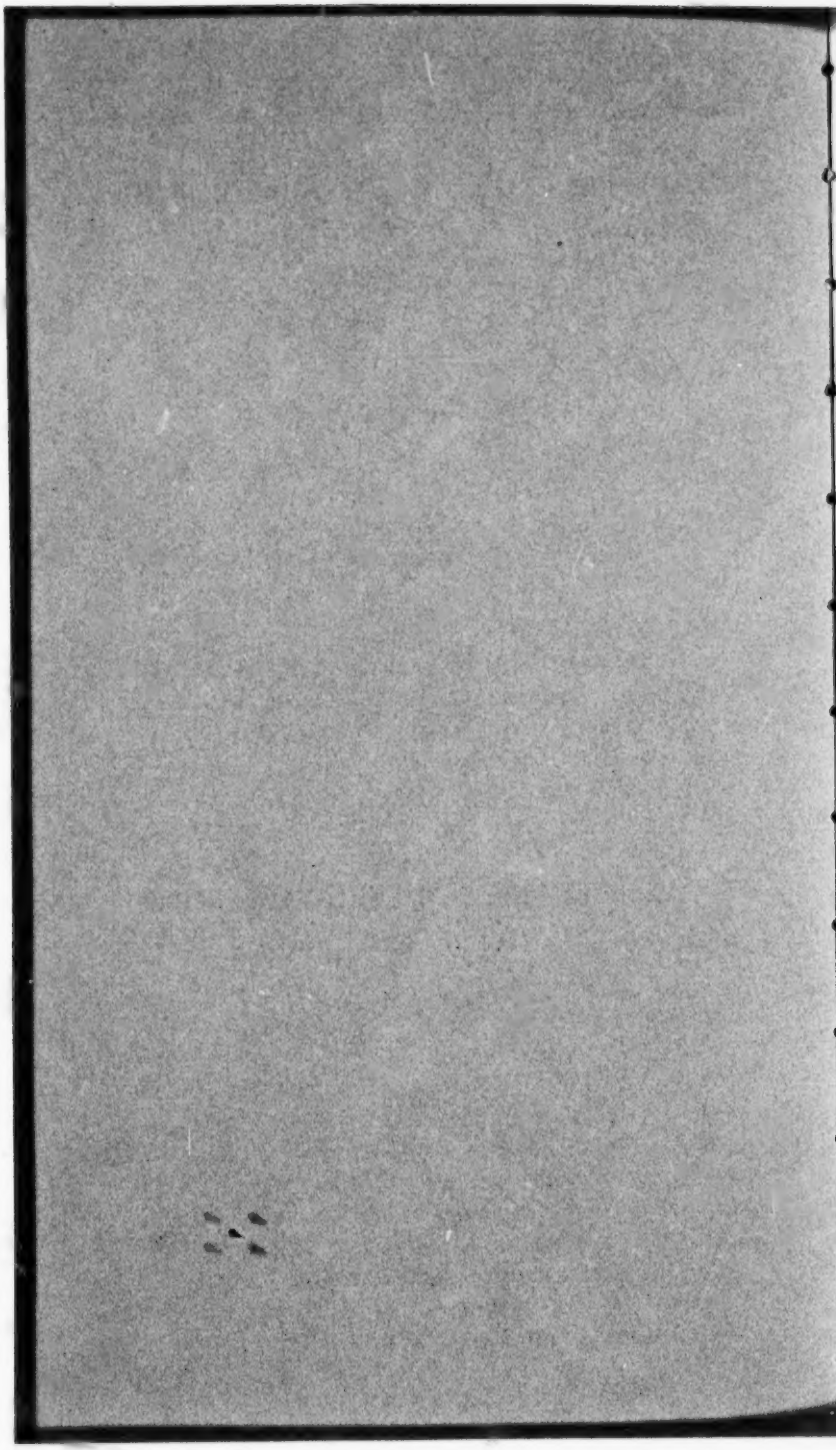
of

UNITED STATES OF AMERICA, Owner of the Steamship "Western Maid," for a Writ of Prohibition and/or Mandamus, Petitioner,

—against—

HONORABLE J. WHITAKER THOMPSON, Judge of the District Court of the United States for the Eastern District of Pennsylvania, and the other judges and officers of said Court.

AMENDED AND SUPPLEMENTAL RETURN.



IN THE

Supreme Court of the United States.

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In the Matter of

UNITED STATES OF AMERICA, OWNER OF THE STEAMSHIP "WESTERN MAID," FOR A WRIT OF PROHIBITION AND/OR MANDAMUS, PETITIONER,

against

HONORABLE J. WHITAKER THOMSON, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA, AND THE OTHER JUDGES AND OFFICERS OF SAID COURT.

AMENDED AND SUPPLEMENTAL RETURN.

I, J. WHITAKER THOMPSON, Judge of the District Court of the United States for the Eastern District of Pennsylvania, as amending and supplementing the return heretofore filed by me in the above entitled cause, under my hand and the seal of the said Court, on the seventh day of October, 1921, do hereby appear, certify and make further return as follows:

At the hearing, upon the Suggestion of Want of Jurisdiction filed on behalf of the United States of America, there was presented to the Court a copy of a Bill of Lading covering certain cargo shipped on board the steamship called the "WESTERN MAID," which Bill

of Lading was dated the thirteenth day of January, 1919, and there was also presented to the Court thirteen photostatic copies of the manifest sheets of the steamship "WESTERN MAID," covering the cargo shipped on the said steamship on the voyage during which the collision with the steamship "BRITISH ISLES" occurred, and upon which the libel filed in this cause is based.

A copy of the said Bill of Lading is attached hereto, made part hereof, and marked Exhibit "A," and photostatic copies of Sheet No. 1 of the said thirteen manifest sheets and the final sheet of the said manifest sheets are attached hereto, made part hereof, and marked respectively Exhibits "B" and "C." Manifest sheets numbered 2 to 12, inclusive, being of the same form and tenor as those attached, are omitted from the record by consent of the parties.

The said copy of the Bill of Lading and the said manifest sheets constituted a part of the record before this Court, at the time of hearing and decision in this matter, and were omitted from the record attached to the petition for writ of prohibition heretofore filed herein, the said papers then not being lodged with the Clerk of the Court.

And having further answered on behalf of myself, the other judges and officers of said Court, I respectfully submit that said rule should be dismissed and said writ denied and that we be hence dismissed.

IN WITNESS WHEREOF, I, J. WHITAKER THOMPSON, Judge of the District Court of the United States for the Eastern District of Pennsylvania, for and on behalf of myself and the other judges and officers of said Court, have hereunto set my hand and the seal of said Court this ninth day of December, A. D. 1921.

J. WHITAKER THOMPSON,
United States District Judge.

FOOD ADMINISTRATION (GRAIN) CORPORATION

42 BROADWAY, NEW YORK

272 BOURSE BLDG.,
PHILADELPHIA, PA.

17 STATE STREET
BALTIMORE, MD.

HERBERT HOOVER	Chairman
JULIUS H. BARNES	President
FRANK G. CROWELL	Vice-President
GATES W. McGARRAH	Treasurer
WATSON S. MOORE	Secretary
HOWARD M. SMITH	Assistant Secretary

	140# sacks	Weight-Lbs.
Soft Wht. Flour	71,367	9,991,380
Barley flour	13,953	1,953,420
Rye flour	1,211	169,540
Total	86,531	12,114,340
	Tierces	**Weight-Lbs.**
Pure Refined Lard	1,742	640,258
	Boxes	
Pure Refined Lard	10,250	574,000
	Half Bbls.	
Pure Refined Lard	366	40,992
Total		1,255,250
Total Weight		13,369,590 lbs.

FREIGHT AS AGREED.

ADMINISTRATION (GRAIN) CORPORATION

2 BROADWAY, NEW YORK

LDG., IA, PA. — **17 STATE STREET BALTIMORE, MD.**

OOVER	Chairman
BARNES	President
OWELL	Vice-President
CARRAH	Treasurer
MOORE	Secretary
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FREIGHT AS AGREED.

EXHIBIT A

BILL OF LADING

Copy

B/L Number.....

SHIPPED in good order and condition by the FOOD ADMINISTRATION GRAIN CORPORATION, on board the U. S. STEAMSHIP called the Western Maid Whereof E. O. Smith is master, and now lying in the Port of New York and bound for Falmouth, England, for orders To say Destination as ordered on arrival Falmouth, England being marked and numbered as in the margin, and are to be delivered in the like good order and condition at the Port of Falmouth, England, or as ordered, unto the FOOD ADMINISTRATION GRAIN CORPORATION, CARE AIERICAN EMBASSY, LONDON, ENGLAND, or to his or their assigns c/o Chief Quartermster, A. E. F., France. All the conditions and exceptions of the Charter Party or agreemen now existing between the War Department of the United States and the United States Shipping Board applicable to this vessel are hereby incorporated herein and are to be deemed apart hereof.

General Average, if any, to be stated at the Port of New York and payable according t York-Antwerp Rules 1890 and Antwerp Rule 1903, and as to matters not covered hereby, according to the custom and practice of the Port of New York.

In Witness Whereof, the Master or Agent of the said Ship hath affirmed to 2 Bills of Lading all of his tenor and date numbered consecutively, one of which being accomplished, the others to tand void.

Dated in New York this 13th day of January, 1919.

For the Supt. of Water Transportation, Port of New York

J. D. CUSHING,
Master or Agents.
Major Q. M. Corps

CHART

TOO

LARGE

FOR

FILMING

WM. R. STANSBURY
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1921.

No. 21 Original.

In the Matter

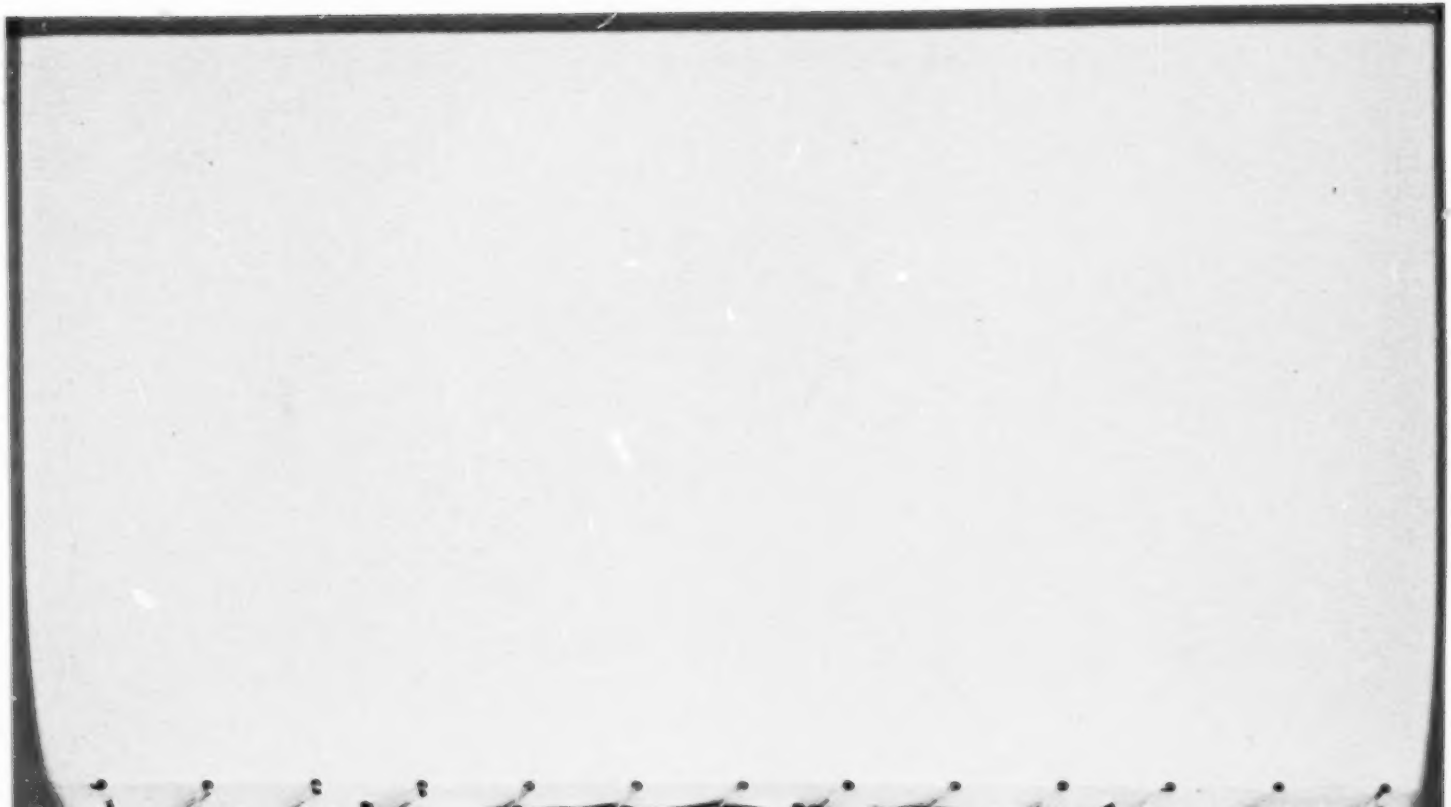
of

UNITED STATES OF AMERICA, Owner of the Steamship "Western Maid," for a Writ of Prohibition and/or Mandamus, Petitioner,

—against—

HONORABLE J. WHITAKER THOMPSON, Judge of the District Court of the United States for the Eastern District of Pennsylvania, and the other judges and officers of said Court.

RETURN.



IN THE

Supreme Court of the United States

October Term, 1921.

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In the Matter of

UNITED STATES OF AMERICA, OWNER OF THE STEAMSHIP "WESTERN MAID," FOR A WRIT OF PROHIBITION AND/OR MANDAMUS, PETITIONER,

against

HONORABLE J. WHITAKER THOMPSON, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA, AND THE OTHER JUDGES AND OFFICERS OF SAID COURT.

RETURN.

I, J. WHITAKER THOMPSON, Judge of the District Court of the United States for the Eastern District of Pennsylvania, for and in behalf of myself and the other judges and officers of said Court, in obedience to the order to show cause herein, issued out of the Supreme Court of the United States on the eleventh day of April 1921, on the petition herein, directing me and the other judges and officers of said Court to show cause why a Writ of Prohibition should not issue against me and the other judges and officers of said Court, and why a Writ of Mandamus should not issue against me in accordance with the prayer of the petition, hereby appear, certify and make return as follows:

Answering generally the said petition, the determination of the question of jurisdiction was based solely upon facts which appeared before the court, as set out in the Libel and in the Suggestion of Want of Jurisdiction, filed by Francis Fisher Kane, United States Attorney for the Eastern District of Pennsylvania, and the Exhibits "A" and "B" attached thereto; the Affidavit of Howard M. Smith, attached; and the Memorandum from Mr. Hoover, dated November 16, 1918, and the record then filed in said cause, all of which are set forth in the petition, pages 14 to 33 inclusive, and are made part of this return, and it is respectfully submitted that any additional averments and allegations of fact in the petition contained, should not be considered in the question now presented to the Court.

Answering specifically secions 1 to 3, inclusive, of the said petition, the statements therein, insofar as they are a recital of the statements contained in the Libel and Suggestion of Want of Jurisdiction, are admitted as being the statements upon which the judgment of the Court was founded, but it was not made to appear to the Court otherwise than as appears from the statements contained in the Suggestion of Want of Jurisdiction, that the steamship "Western Maid" was employed at the time of the collision in the furtherance of military operations.

In the Affidavit of Howard M. Smith, and the memorandum of Herbert Hoover, filed by the United States of America, with and as a part of its Suggestion of Want of Jurisdiction herein, it appeared that the steamship "Western Maid" was employed at the time of the collision, to wit, January 10, 1919, in the carriage of flour and packinghouse products, purchased by the War Department in co-ordination with the United States Food Administration, and intended to be sold to the civil propulations of Europe.

Answering section 4 of said Petition, the statements therein are as set forth, with the exception that this Court is not now proceeding to hear and determine the merits of the Libel.

Answering section 5 of said Petition, the United States, made claim for said steamship in said court and caused to be filed of record a stipulation for value executed by the United States Shipping Board, Emergency Fleet Corporation, which has been substituted for the steamship "WESTERN MAID" as respondent.

Answering section 6 of said Petition, the statements therein are true.

Answering section 7 of said Petition, it is respectfully submitted that the respondent is not required to answer a question of fact "now represented" by the Petition. For the reason that the question raised must be based upon the facts as they appeared from the libel and suggestion filed, the respondent does not undertake to answer whether or not it is true as alleged in the petition that "at the time of the collision the 'WESTERN MAID' was a commissioned vessel of the Navy and employed by her sovereign owner as an army cargo transport serving military needs."

Further answering, it was shown to the respondent by the Certificate of Registry of the said vessel, filed as Exhibit "B," with the Suggestion of Want of Jurisdiction, that at the time of the collision the said vessel was owned by the United States of America, represented by the United States Shipping Board and was allocated by the United States Shipping Board to the War Department.

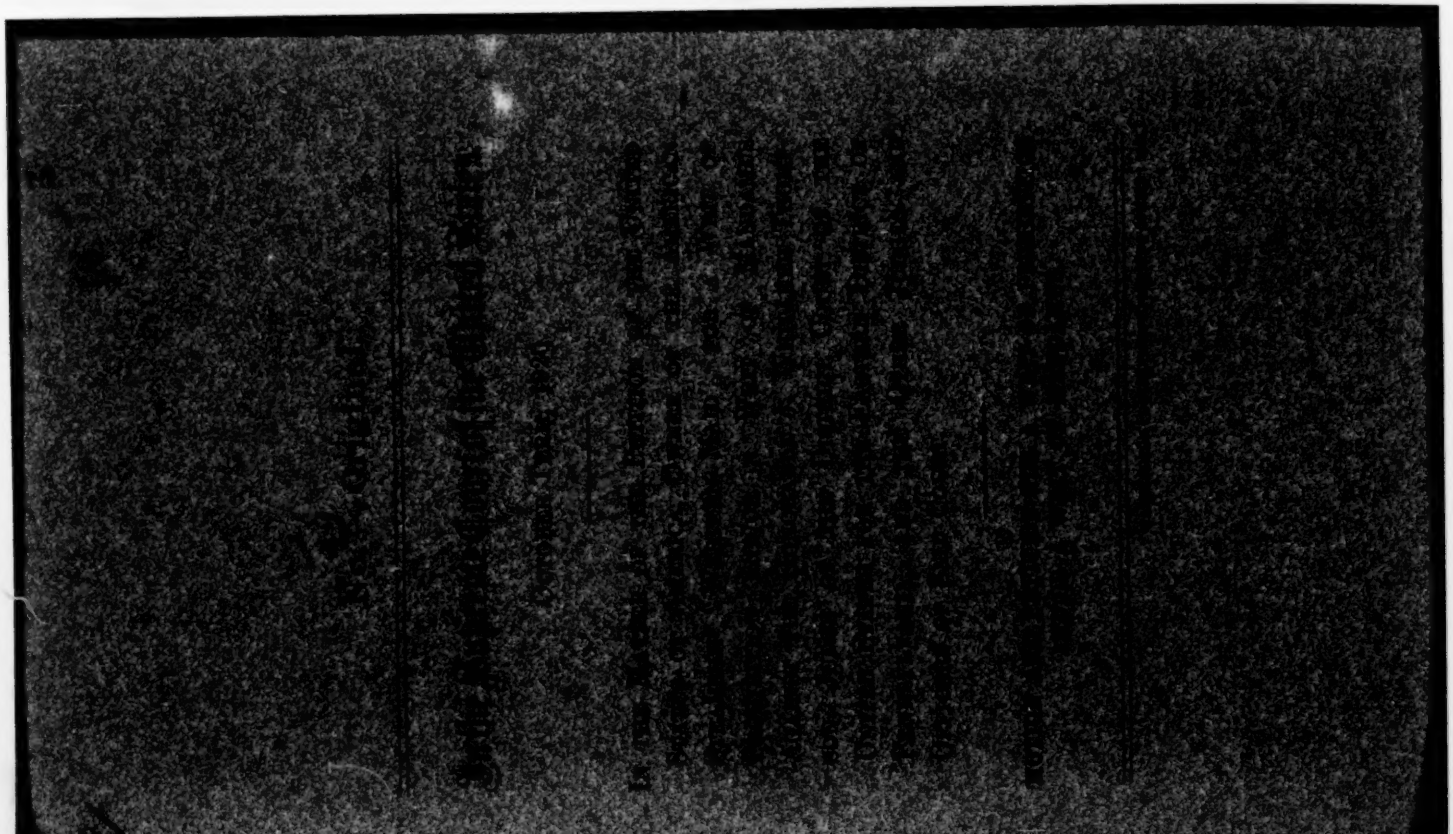
Further answering section 7 of said Petition, it is respectfully submitted that the question whether a liabiliy or maritime lien was created by the collision, against the steamship "WESTERN MAID" is not a question of jurisdiction, but is a question on the merits

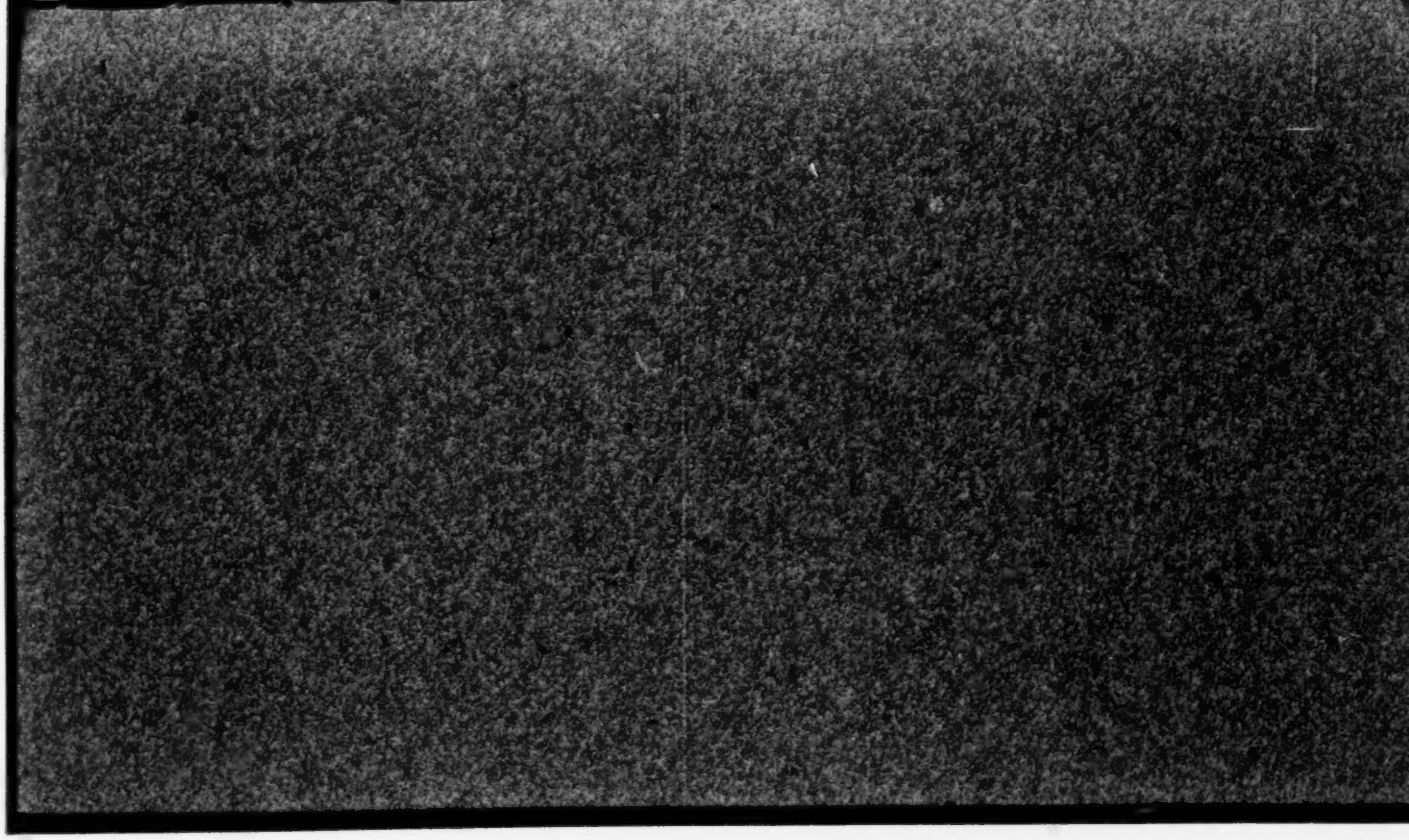
depending upon whether or not the Court finds at the trial that the "WESTERN MAID" was at fault and was employed as a merchant vessel. It is further respectfully submitted that the tort sued upon is not a tort of a naval officer, but a tort of the vessel herself; that the steamship "WESTERN MAID" upon the facts appearing from the libel and suggestion filed was not, either at the time of the collision or at the time of the issuance and execution of process, immune from liability, or maritime lien for said collision damages; that it is the opinion of your respondent that by virtue of section 9 of the Shipping Act of November 7, 1916, the petitioner has consented to suit; that said Court has jurisdiction of the subject matter of the suit, had at the time of the issuance and execution of process jurisdiction of the *res*, and by substitution of the United States Shipping Board Emergency Fleet Corporation as respondent in lieu of the *res*, has jurisdiction at present, and has properly exercised its judicial powers to proceed, hear and determine said question.

And having fully answered on behalf of myself and the other judges and officers of said Court, I respectfully submit that said rule should be dismissed and said writs denied, and that we be hence dismissed.

IN WITNESS WHEREOF, I, J. WHITAKER THOMPSON, Judge of the District Court of the United States for the Eastern District of Pennsylvania, for and in behalf of myself and the other judges and officers of said Court, have hereunto set my hand and the seal of said Court this seventh day of October, 1921

J. WHITAKER THOMPSON,
(Seal of Court) *United States District Judge.*





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In the Supreme Court of the United States.

OCTOBER TERM, 1920.

NO. —, ORIGINAL.

IN THE MATTER OF THE PETITION OF THE UNITED STATES OF AMERICA, AS OWNER OF THE AMERICAN STEAMSHIP "WESTERN MAID."

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF PROHIBITION AND/OR A WRIT OF MANDAMUS.

And now comes Harry M. Daugherty, Attorney General of the United States, on behalf of the United States of America, owner of the steamship *Western Maid*, and moves:

1. For leave to file the petition for a writ of prohibition and/or a writ of mandamus, hereto annexed, and

2. That a rule be entered and issued directing the District Court of the United States for the Eastern District of Pennsylvania and the Honorable J. Whitaker Thompson, a judge thereof, and the other judges and officers of said court, to show cause why a writ of prohibition and/or a writ of mandamus should not issue aganst them and each of them, in accordance with the prayer of said petition, and why the United States of America should not have such other and further relief therein as may be just.

HARRY M. DAUGHERTY,
Attorney General for the United States.

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

NO. —, ORIGINAL.

IN THE MATTER OF THE PETITION OF THE UNITED STATES OF AMERICA, OWNER OF THE AMERICAN STEAMSHIP "WESTERN MAID," FOR A WRIT OF PROHIBITION AND/OR A WRIT OF MANDAMUS, AGAINST THE HONORABLE J. WHITAKER THOMPSON, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA, AND THE OTHER JUDGES AND OFFICERS OF SAID COURT.

PETITION FOR A WRIT OF PROHIBITION AND/OR A WRIT OF MANDAMUS.

To the honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Harry M. Daugherty, Attorney General of the United States, on behalf of the United States of America, owner of the American steamship *Western Maid*, against the Honorable J. Whitaker Thompson, a judge of the District Court of the United States for the Eastern District of Pennsylvania, sitting in admiralty, and against the other judges and officers of said court, respectfully represents:

First. That on November 8, 1919, the British Tanker Company Ltd. (amended name, British Petroleum Company, Ltd.), owner of the British steamship *British Isles*, filed a libel in the District Court of the United States for the Eastern District of Pennsylvania, in admiralty, against the steamship *Western Maid*, to recover damages in the sum of $40,000, resulting from collision between the vessels on January 10, 1919, in New York Harbor, New York. It prayed that process, according to the course and practice in causes of admiralty and maritime jurisdiction, may issue against the steamship *Western Maid*, and that the court decree to libellant its damages, and that the said steamship be condemned and sold to satisfy the same. A copy of the libel, as part of the record of proceedings in said court, is hereto annexed.

Second. That the status of the steamship *Western Maid* was and is as follows:

The *Western Maid*, while in course of construction, was requisitioned by the United States, pursuant to the authority and direction embodied in the Executive order of July 11, 1917, made by the President by authority vested in him by the section entitled "Emergency shipping fund" of the act of Congress approved June 15, 1917, entitled "An act making appropriations to supply urgent deficiencies in appropriations by the Military and Naval Establishments on account of war expenses for the fiscal year ending June 15, 1917, and for other purposes," and then was

completed and documented in its name. At all times since the *Western Maid* has been owned by the United States and has been in its possession and control.

On January 10, 1919, the date of said collision, the steamship *Western Maid*, manned by a commissioned crew of the United States Navy, was employed in the furtherance of military operations as an Army cargo transport.

At the time of the filing of the libel aforesaid and the arrest and attachment of the *Western Maid* thereunder, the said steamship had been delivered by the War Department to the United States Shipping Board and was employed in merchant service.

Third. That thereafter Francis Fisher Kane, then the United States attorney for the eastern district of Pennsylvania, specially appearing on behalf of the United States for the purpose of questioning the jurisdiction of said court to proceed in said cause, filed of record suggestion that inasmuch as the steamship *Western Maid* was owned by the United States at the time of the collision and was manned by the Navy and employed by the War Department as a cargo transport carrying quartermaster's supplies abroad, she was immune from liability for collision damages, and the said court was without jurisdiction to proceed against the vessel or to hear and determine the matters alleged in said libel. Copies of said suggestion and supporting affidavits, as part of the record of proceedings in said court, are hereto annexed.

Fourth. That thereafter the matter came on for hearing before the Honorable J. Whitaker Thompson, one of the judges of said court, upon the right of said court to assume jurisdiction of or otherwise to hear and determine the matters alleged in said libel, who handed down an opinion in which, while finding that the *Western Maid* at the time of the collision was an Army cargo transport belonging to the United States and employed in carrying supplies in the usual manner of transmission of quartermaster's supplies consigned to the chief quartermaster of the American Expeditionary Forces abroad, nevertheless assumed jurisdiction upon the theory that the happening of the collision impressed upon such Army transport a lien liability for resulting damages, which, while not then enforceable, survived and became enforceable upon and during the vessel's commitment to merchant service. Thereupon the said court assumed jurisdiction of the said libel and is proceeding to hear and determine the merits thereof. Copy of the opinion of the court, as part of the record of proceedings in said court, is hereto annexed.

Fifth. That in order to avoid detention to the said steamship *Western Maid* by her seizure, arrest or attachment, which would seriously interfere with her operation, but without conceding or recognizing any rights of the said court to enforce by process such seizure, arrest or attachment, and reserving the right of the United States to question the jurisdiction of the court therein, the United States of America duly made claim for said steamship in said court, and

caused to be filed of record, a stipulation executed by the United States Shipping Board Emergency Fleet Corporation, conditioned for the payment of any award made under the final decree of the court in said proceedings. Copies of said claim and stipulation, as part of the record of proceedings in said court, are hereto annexed.

Sixth. That a certified copy of the records of proceedings in said District Court of the United States for the Eastern District of Pennsylvania, filed in the said cause, is hereto annexed and made a part hereof.

Seventh. That it is now represented that inasmuch as, at the time of the collision, the *Western Maid* was a commissioned vessel of the Navy and employed by her sovereign owner as an Army cargo transport, serving military needs, she was immune from liability for said collision damages. Further, that said libel proceedings, in substance and effect, is an action against your sovereign petitioner and presents a claim for tort arising out of a collision alleged to have resulted from the incompetence or want of skill of naval officers commissioned to man and operate an Army transport, and that for the liability of such losses this sovereign petitioner has not consented to suit. By reason thereof, the said District Court was, and is, without jurisdiction to proceed to hear and determine the matters alleged in said libel *in rem* filed against said steamship.

Wherefore, the said Harry M. Daugherty, Attorney General of the United States, the aid of this honorable court respectfully requesting, prays:

1. That a writ of prohibition may issue out of this honorable court to the said Honorable J. Whitaker Thompson, judge of the United States District Court, for the Eastern District of Pennsylvania, and/or the other judges and officers of said court, prohibiting him and them from taking any steps whatsoever in the cause aforesaid, and, generally, from the further exercise of jurisdiction in said cause, or the enforcing of any order, judgment, or decree made under color thereof.

2. That a writ of mandamus be issued out of and from this honorable court, directing and commanding the Honorable J. Whitaker Thompson, judge of the United States District Court for the Eastern District of Pennsylvania, to vacate the order so entered by him, directing that process issue against the said steamship *Western Maid*, as prayed for in the libel filed in said cause, and to vacate and cancel the claim of the United States of America, required to be filed to obtain the release of said steamship, and the stipulation of the United States Shipping Board Emergency Fleet Corporation filed therein, and, further, to enter an order in said cause declaring the said steamship *Western Maid* immune from liability for said collision damages.

3. That the court grant to the United States of America such other and further relief as may be just in the premises.

HARRY M. DAUGHERTY,
Attorney General of the
United States of America.

I have read the foregoing petition by me subscribed, and the facts therein stated are true to the best of my information and belief.

HARRY M. DAUGHERTY.

Subscribed and sworn to before me this 25th day of March, 1921.

JULIA B. RISHEL,

[SEAL.] *Notary Public, District of Columbia.*

TRANSCRIPT OF RECORD OF PROCEEDINGS IN DISTRICT COURT.

DOCKET ENTRIES.

In the District Court of the United States for the Eastern District of Pennsylvania. *British Tanker Company (Ltd.)* v. *S. S. Western Maid.* No. 77 of 1919.

Nov. 8, 1919. Libel filed.

Order of court fixing stipulation in $46,000 directing process to issue.

Stipulation for costs by British Tanker Company (Ltd.) with International Fidelity Insurance Company surety, in $250 drawn, acknowledged, and filed.

Attachment exit, returnable November 14, 1919.

Nov. 12, 1919. Claim filed.

Nov. 13, 1919. Attachment returned "attached" and filed.

Nov. 14, 1919. Appearance of Francis Fisher Kane for purpose of objecting to jurisdiction filed.

Nov. 20, 1919. Stipulation of United States Shipping Board Emergency Fleet Corporation in the sum of $46,000 filed.

Order of court approving stipulation filed.

Feb. 19, 1920. Suggestion of want of jurisdiction filed.

Exhibit A filed.

Feb. 25, 1920. Præcipe to place case on argument list filed.

Apr. 5, 1920. Rule for commission on behalf of libellant filed.

Interrogatories filed.

May 19, 1920. Affidavit as to status of *Western Maid* filed.

Suggestion of want of jurisdiction argued.

May 27, 1920. Acceptance of service of rule for commission and interrogatories filed.

Commission on behalf of libellant to Hull, England, exit.

July 8, 1920. Opinion, Thompson, J., dismissing suggestion of want of jurisdiction and overruling objection to jurisdiction.

Oct. 9, 1920. Commission to Hull, England, returned and filed.

Nov. 24, 1920. Amended libel filed.

Nov. 24, 1920. Agreement of counsel as to filing amended libel filed.

LIBEL IN REM.

Filed Nov. 8, 1919. No. 77 of 1919. The libel and complaint of the British Tanker Company (Ltd.) against the steamship *Western Maid*, her engines, boilers, etc., and all persons intervening herein in their interests, in a cause of collision, civil and maritime, alleges on information and belief and respectfully shows to this honorable court as follows:

To the honorable the judges of the United States District Court for the Eastern District of Pennsylvania:

First. That at and during all the times hereinafter mentioned, your libellant was and still is a foreign corporation, organized and existing under and by virtue of the laws of the Kingdom of Great Britain and Ireland, and having an office and place of business at Gresham House, 240 Broad Street, in the city of London, in England.

Second. That at and during all the times hereinafter mentioned, your libellant owned and operated the steamship *British Isles*.

Third. That the steamship *Western Maid* is now or will be during the pendency of process herein within this district and within the jurisdiction of this honorable court.

Fourth. That at and during all the times hereinafter mentioned, and prior to and up to the time of the collision hereinafter mentioned, the steamship *British Isles* was tight, stanch, strong, and in all respects seaworthy, and properly manned and equipped.

Fifth. That on the 10th day of January, 1919, the Steamship *British Isles* was lying at anchor in New York Harbor off Stapleton, Staten Island. The weather was clear and there was a moderate breeze. The ship was swinging to the ebb tide and was well within the anchorage grounds. Her anchor lights were set and burning brightly. At about 9.35 p. m. the steamship *Western Maid* was observed approaching the steamship *British Isles* from the southward. As the *Western Maid* approached the *British Isles*, those in charge of her apparently lost control of her engines, and her port bow collided with the starboard side of the *British Isles* seriously damaging the steamship *British Isles*.

Sixth. That the aforesaid collision and consequent damage were not caused or contributed to by any fault, neglect or want of care on the part of the libellant or the said steamship *British Isles* or those in charge of her but were wholly and solely due to the fault, neglect and want of care of the steamship *Western Maid* and those in charge of her in the following among other particulars, which will be pointed out upon the trial of this action:

1. In that the steamship *Western Maid*, being the moving vessel, did not keep clear of the steamship *British Isles* which was at anchor.

2. In that the steamship *Western Maid* failed to maintain a proper and efficient lookout.

3. In that the steamship *Western Maid* failed to stop and reverse her engines when the danger of collision was or should have been apparent.

4. In that the steamship *Western Maid* was not in charge of a competente, pilot, master, and crew.

5. In that those in charge of the steamship *Western Maid*, after the danger of collision was or should have been apparent, took no proper means to avoid same.

6. In that the steamship *Western Maid* failed to navigate with reference to the steamship *British Isles* in ample time to avoid colliding with her.

Seventh. By reason of the premises, your libellant has sustained damage in the sum of forty thousand ($40,000) dollars, as nearly as the same can now be estimated, no part of which has been paid, although duly demanded.

Eighth. All and singular these premises are true and within the admiralty and maritime jurisdiction of the United States and of this honorable court.

Wherefore libellant prays that process in due form of law, according to the course and practice of this honorable court in causes of admiralty and maritime jurisdiction issue against the said steamship *Western Maid*, her engines, boilers, etc., and that all persons having or claiming any interest therein be cited to appear and answer all and singular the matters aforesaid; that this honorable court be pleased to decree to your libellant its damages, with interest and costs, and that the steamship *Western Maid*, her engines, etc., be condemned and sold to satisfy the same, and that your libellant may have such other and further relief as in law and justice it may be entitled to receive.

HARRINGTON BIGHAM & ENGLAR,
Proctors for Libellant, 64 Wall Street,
New York City.

CONLEN, BRINTON & ACKER,
1935 Commercial Trust Bldg.,
Philadelphia, Pa.

STATE OF NEW YORK,

County of New York, ss:

O. R. Houston, being duly sworn, deposes and says that he is a member of the firm of Harrington, Bigham & Englar, proctors for the libellant herein; that he has read the foregoing libel and knows the contents thereof and that the same is true to the best of his knowledge, information, and belief.

That the reason this verification is made by deponent and not by libellant is that libellant is a foreign corporation and none of its officers is now within this jurisdiction.

That the grounds of deponent's knowledge and the sources of his belief are documents in his possession and statements made to him by the libellant.

O. R. HOUSTON.

Sworn to before me this 29th day of August, 1919.

[SEAL.] JOSEPH L. O'CONNELL,
Notary Public, Nassau County.

Cet. filed in N. Y. County, Clerk No. 105.

N. Y. County Register No. 1186.

Term expires Mar. 30, 1921.

(Indorsed:) Before Thompson, J. Let process issue. Stipulation fixed at $46,000.00. By the Court. Attest: E. G. Johnson, Deputy Clerk.

CLAIM.

Filed Nov. 12, 1919. In the District Court of the United States for the Eastern District of Pennsylvania. *British Tanker Company (Ltd.)* v. *Steamship Western Maid.* No. 77 of 1919.

And now, to wit, this eleventh day of November, 1919, the United States of America, by its proctor, Francis Fisher Kane, United States attorney for the eastern district of Pennsylvania, without admitting the jurisdiction of the said court in the cause, intervening for its interests as owner of the steamship *Western Maid*, appears before the honorable court and makes claim for the said steamship *Western Maid*, her engines, boilers, etc., and avers that the said steamship *Western Maid* was in the possession of the United States as owner at the time of the attachment herein, and that the United States is the true and bona fide owner of the said steamship and that no other person is owner thereof.

Wherefore, he prays to be admitted to defend accordingly, without admitting the jurisdiction of the said court in the cause, and without submitting the rights of the United States to said jurisdiction.

FRANCIS FISHER KANE,
Proctor for Claimant.

Eastern District of Pennsylvania, ss.

The President of the United States of America, to the Marshal of the Eastern District of Pennsylvania, greeting:

You are hereby commanded, in the name and by the authority of the United States, forthwith to seize

and attach the steamship or vessel, called the *Western Maid*, whereof John Doe is master, together with all and singular her engines, boilers, and machinery, tackle, apparel, and furniture as the same now are; and the same safely keep, to abide the final order and decree of the District Court of the United States for the Eastern District of Pennsylvania, in a certain plea, civil and maritime, therein prosecuted against the said steamship *Western Maid*, etc., by British Tanker Company (Ltd.), libellant, for damages for collision, etc. And you are further commanded, in the name and by the authority aforesaid, to cite and admonish the said John Doe, master, and generally all others herein concerned, so that they be and appear before the said District Court within fifteen days after service of this writ made upon them, together with a copy of the libel filed herein, then and there to show cause, if any they have, why the said S. S. *Western Maid*, etc., should not be condemned, etc., for the payment of the said damages for collision, etc. And how you shall have executed this writ do you make return together with this writ on the 14th day of November, A. D. 1919.

Witness the honorable, the judges of the said court at Philadelphia, this 8th day of November, A. D. 1919, and in the 144th year of the independence of the said United States.

[SEAL.] CHARLES F. FUNDINGER,
Deputy Clerk District Court United States,
Eastern District of Pennsylvania.

REQUIREMENTS OF ADMIRALTY RULES.

The answer, and in proceedings *in rem*, the claim also, shall be filed, and a copy of the answer shall be served upon the libellant or his proctor within fifteen days after the service of process.

In default thereof, a decree *pro confesso* may be entered in due course.

(Indorsed:) No. 77, of 1919. U. S. District Court, in admiralty. *British Tanker Co. (Ltd.)* v. *Steamship Western Maid.* Attachment. Plea civil et maritime. Ret. November 14, 1919. Filed November 13, 1919 George Brodbeck, clerk. Stipulation, $46,000. Conlen, Brinton & Acker, proctor for libellant.

NOVEMBER 8, 1919.

As commanded I have attached the steamship *Western Maid*, and have the same now in my custody, also cited the master, Captain Lumboch, by leaving a true and attested copy of the within with, together with a copy of the libel with D. J. Donovan, second mate in charge of said steamship, and making contents of same known to him on the date above mentioned.

So answers

FRANK J. NOONAN,
United States Marshal.
Per THOMAS MARPLE,
Deputy.

STIPULATION FOR RELEASE OF VESSEL.

In the United States District Court for the Eastern District of Pennsylvania. *British Tanker Company (Ltd.), Libellant*, v. *American Steamship Western Maid.* Filed Nov. 20, 1919.

Whereas a libel was filed on the 8th day of November, 1919, by the British Tanker Company (Ltd.), against the American steamship *Western Maid*, her engines, etc., for the reasons and causes in the said libel mentioned; and

Whereas, the said steamship *Western Maid* is now in the custody of the marshal in the above district, under process issued in accordance with the prayer of said libel, as ordered by the above entitled court; and

Whereas, without submitting the rights of the United States to the jurisdiction of the said court, a claim for the said steamship *Western Maid* has been filed by the United States of America by and through Francis Fisher Kane, United States attorney for the eastern district of Pennsylvania, and the value thereof has been fixed for the purpose of bonding at $46,000; and

Whereas the United States Shipping Board Emergency Fleet Corporation, as stipulator, hereby consents and agrees that in case of default or contumacy on the part of the said claimant, execution may issue against its goods, lands, and chattels in the sum of $46,000.

Now, therefore, the condition of this stipulation is such that if it shall hereafter be finally determined

that this court has jurisdiction to proceed in said cause, and if claimant herein and the United States Shipping Board Emergency Fleet Corporation, the stipulator undersigned, shall abide by all orders of the court interlocutory and final, and pay the amount awarded by the final decree rendered by such court or by any appellate court, if an appeal intervenes, then this stipulation shall be void, otherwise to remain in full force and virtue.

UNITED STATES SHIPPING BOARD
EMERGENCY FLEET CORPORATION,
By B. K. OGDEN,
Director of Insurance,
Stipulator.

Approved:

CHARLES F. DUTCH,
Admiralty Counsel.

Attest:
[SEAL.]

JOHN J. FLAHERTY,
Secretary.

Before Dickinson, J.
Bond approved.
By the court.
Attest:

GEORGE BRODBECK,
Clerk.

Nov. 20, 1919.

SUGGESTION OF WANT OF JURISDICTION.

In the District Court of the United States for the Eastern District of Pennsylvania. In admiralty. *British Tanker Company (Ltd.)* v. *S. S. Western Maid.* No. 77, 1919 term. Filed Feb. 20, 1920.

And now comes Francis Fisher Kane, United States attorney for the eastern district of Pennsylvania, appearing specially and not otherwise, as proctor for the United States of America, for the purpose of questioning the jurisdiction of the court in this cause, and respectfully suggests to the court that this honorable court is without jurisdiction to proceed herein, for the reason the S. S. *Western Maid*, on January 10, 1919, at the time of the collision mentioned in the libel filed in this case, was the property of the United States, in its possession and control, and employed in public service for national uses and purposes.

The status of the said S. S. *Western Maid* was and is as follows:

The said S. S. *Western Maid*, while in course of construction at Portland, Oregon, pursuant to the authority and direction embodied in the Executive order of July 11, 1917, a true copy of which is hereto attached, marked "Exhibit A" and made a part hereof, made by the President by virtue of the authority vested in him by the section entitled "Emergency shipping fund," of the act of Congress approved June 15, 1917, entitled "An act making appropriations to supply urgent deficiencies in appropriations

for the military and naval establishments on account of war expenses for the fiscal year ending June 30, 1917, and for other purposes," was requisitioned for the United States by the United States Shipping Board Emergency Fleet Corporation, as agent for the President, which, pursuant to said act and Executive order, completed and equipped said hull, the expenses incident thereto being duly paid in full out of the funds of the United States appropriated for such purposes.

That upon completion, said steamship was delivered to and received by the United States Shipping Board, as agent for the President, which duly caused said steamship to be registered in the name of the United States of America as owner, at the port of Portland, Oregon. A copy of said certificate of registry is hereto attached, marked "Exhibit B" and made a part hereof. At all times the said steamship has been continuously owned by the United States of America and now is.

That thereafter, to wit, January 10, 1919, the said steamship was allocated by the United States Shipping Board to the War Department of the United States for use and employment in its transport service; that the War Department caused said vessel, during its service as a transport, to be manned by a Navy crew; that the collision described in the libel filed in this case occurred on January 10, 1919, after 1 p. m., after said steamship had been delivered to the War Department for service as a transport, and at the time it was manned by a Navy crew; that said steamship remained in such service and was so manned until March 20, 1919, when the vessel was delivered to the United States Shipping Board, which then assigned her to commercial service; that the said

steamship was used and employed in such service on November 8, 1919, when the writ of attachment in this cause was served upon the said steamship; that by reason of the ownership, employment, and service of the said S. S. *Western Maid*, which had the status of a public vessel at the time of the collision, the said S. S. *Western Maid* cannot be declared an offender or have impressed upon her collision liability so that any proceedings *in rem* can be maintained against her to recover for said collision damages; and that the said vessel is now free from seizure or attachment and this court is without jurisdiction to enforce said collision claim against said vessel.

Wherefore, for the reasons and causes above set forth, it is moved that the libel filed herein be dismissed for want of jurisdiction.

FRANCIS FISHER KANE,
United States Attorney for the
Eastern District of Pennsylvania.

EXHIBIT A.

EXECUTIVE ORDER DELEGATING TO THE SHIPPING BOARD AND THE EMERGENCY FLEET CORPORATION THE POWERS GRANTED THE PRESIDENT BY THE EMERGENCY SHIPPING LEGISLATION.

By virtue of authority vested in me in the section entitled "Emergency shipping fund" of an act of Congress entitled "An act making appropriations to supply urgent deficiencies in appropriations for the Military and Naval Establishments on account of war expenses for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes," approved June 15, 1917, I hereby direct

that the United States Shipping Board Emergency Fleet Corporation shall have and exercise all power and authority vested in me in said section of said act, in so far as applicable to and in furtherance of the construction of vessels, the purchase or requisitioning of vessels in process of construction, whether on the ways or already launched, or of contracts for the construction of such vessels, and the completion thereof, and all power and authority applicable to and in furtherance of the production, purchase, and requisitioning of materials for ship construction.

And I do further direct that the United States Shipping Board shall have and exercise all power and authority vested in me in said section of said act, in so far as applicable to and in furtherance of the taking over of title or possession, by purchase or requisition, of constructed vessels, or parts thereof, or charters therein; and the operation, management, and disposition of such vessels, and of all other vessels heretofore or hereafter acquired by the United States. The powers herein delegated to the United States Shipping Board may, in the discretion of said board, be exercised directly by the said board or by it through the United States Shipping Board Emergency Fleet Corporation, or through any other corporation organized by it for such purpose.

WOODROW WILSON.

THE WHITE HOUSE,
11 July, 1917.

EXHIBIT B.

DUPLICATE CERTIFICATE OF REGISTRY.

Cat. No. 1266.

(This form is for use in making duplicate of certificate of registry for Bureau of Navigation.)

Permanent Register No. 13.

Official No. 216754. Letters, LMKT.

The United States of America. Department of Commerce. Bureau of Navigation.

Measured: Portland, Oreg., 1918.

Radio call: K Q O O. Service: O. freight. Number of crew: 50.

In pursuance of chapter one, Title XLVIII, "Regulation of commerce and navigation," Revised Statutes of the United States. F. B. Pape, of Portland, Oregon, agent, having taken and subscribed the oath required by law, and having sworn that the United States, represented by the United States Shipping Board, is the only owner of the vessel called the *Western Maid*, of Portland, Oregon, whereof E. O. Smith is at present master, and is a citizen of the United States, and that the said vessel was built in the year 1918, at Portland, Oregon, of steel, as appears by certificate of Ed. C. Pape, master carpenter, dated at Portland, Oregon, June 12, 1918, and J. H. Klippel, special surveyor, having certified that the said vessel is a steam screw; that she has two decks, two masts, a sharp head, and an elliptic stern; that her register length is 409.8 feet, her register breadth 54.2 feet, her register depth 27.7 feet, that she measures as follows:

	Tons.
Capacity under tonnage deck	5,138.92
Capacity between decks above tonnage deck double bottom	1,102.57

	Tons.	
Capacity of inclosures on the upper deck, viz, forecastle, 128.45; bridge, 31.45; poop, 150.34; houses—round, 160.49; saddle back, 7.82; chart, 6.39; radio, 15.77; excess hatchways, 44.12; light and air, 85.00		629.83
Gross tonnage		5,871.32
Deductions under section 4153, Revised Statutes, as amended:		
Crew space, 300.55; master's cabin, 16.68	317.23	
Anchor gear, 16.35; boatswain's stores, 57.85	74.20	
Charthouse, 6.39; radiohouse, 15.77	22.16	
Propelling power (actual space, 763.43), 32 per cent.	1,878.82	
Total deductions		2,292.41
Net tonnage		3,578.00

The following-described space, and no others, have been omitted, viz: Open bridge, 476.45; steering gear, 16.32; light and air, 16.00; wheelhouse, 5.21; galley, 14.49; water-closets, 2.06; cabins, companion house, 0.87.

And the said E. C. Pape having agreed to the description and admeasurement above specified, according to law, said vessel has been duly registered at this port.

Given under my hand and seal, at the port of Portland, Oregon, this 20th day of August, in the year one thousand nine hundred and eighteen.

WILL MOORE,
Collector of Customs.

(Indorsed:) Office of Collector of Customs, District of Oregon, port of Portland, Oregon. I hereby certify the within to be a true copy of the original on record in this office. Given under my hand and seal this 24th day of February, 1920. L. A. Pike, collector of Customs. Cat. No. 1266. O. N. 216754. Department of Commerce, Bureau of Navigation. Duplicate certificate of registry No. 13, of the steam screw called the *Western Maid*, of Portland, Oregon, 5,871 gross, 3,578 net. Issued at the port of Portland, Oregon, August 20, 1918.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Howard M. Smith, being duly sworn according to law, deposes and says: That he is now secretary to the United States wheat director and assistant secretary of the United Grain Corporation, successor to the Food Administration Grain Corporation, and during the year 1918 and 1919, had knowledge of the affairs and relations of the United States Food Administration. That on January 10th, 1919, the United States steamship *Western Maid*, then operated and controlled by the War Department but manned by a Navy Department crew, had loaded at the port of New York, a cargo of flour and packing-house products intended for the relief of the civilian populations of Europe, the said steamship *Western Maid* being bound for Falmouth, England, for orders. That the arrangements with regard to furnishing the foodstuffs for the relief of the civilian population of Europe, shipped aboard the steamship *Western Maid*, were that such cargo had been furnished by the War Department from emergency purchases made in the usual coordination with the United States Food Administration by authority of the President, November 12th, 1918, the War Department loading and shipping such supplies in the usual manner of transmission of the quartermaster supplies, and delivered in Europe to the chief quartermaster, American Expeditionary Forces, or to the United States Food Administration. A copy of the memorandum of such arrangements as approved by the President is hereto attached, marked "Exhibit A" and made a part hereof. That any moneys paid for such supplies were paid by the United States Treasury, Controller of the State and Other Departments, out of an appropriation of $100,000,000 made by act of Congress

approved February 14th, 1919, for the relief of the civilian population of Europe.

Further deponent avers that no freight charges have been paid by the United States Food Administration, or by the United States Grain Corporation for the transportation of said foodstuffs loaded aboard the steamship *Western Maid*.

HOWARD M. SMITH.

Sworn to before me this 18th day of May, 1920.

[SEAL.] C. N. HITCHCOCK,

Notary Public, New York Co., No. 1225.

New York Co. Clerks No. 189.

Certificate filed in N. Y. Co.

Commission expires March 30, 1921.

MEMORANDUM RECEIVED FROM MR. HOOVER, NOVEMBER 16, 1918.

NOVEMBER 12, 1918.

MEMORANDUM OF ARRANGEMENTS WITH REGARD TO PROVISIONING THE POPULATIONS WHICH ARE NOW OR HAVE BEEN UNDER THE DOMINATION OF THE CENTRAL EMPIRES.

1. Mr. Hoover, as United States Food Administrator, will proceed at once to Europe to determine what action is required from the United States and what extensions of the Food Administration organization or otherwise are necessary in order to carry out the work of the participation of the United States Government in this matter, and to take such steps as are necessary in temporary relief.

2. In order to expedite the movement of foodstuffs toward Europe, the War Department will undertake to purchase in the usual coordination through the Food Administration during the next twenty days, 120,000 tons of flour and from 30,000,000 to 40,000,000 pounds of pork products. These foodstuffs to be shipped by the diversion of Army tonnage at the earliest possible moment that the Shipping Board arranges, and to be consigned to French ports for reconsignment or storage.

3. Thus foodstuff and any other suitable surplus supplies of the quartermaster in Europe to be made available for distribution at Mr. Hoover's direction, it being understood that if it proves infeasible to reship or redirect the steamers to the territories lately held by the Central Empires, Mr. Hoover will make

OPINION.

UPON SUGGESTION OF WANT OF JURISDICTION.

In the District Court of the United States for the Eastern District of Pennsylvania. *British Tanker Co. (Ltd.)* v. S. S. *Western Maid.* No. 77 of 1919, in admiralty. Filed July 8, 1920.

THOMPSON, J.:

The libellant, owner of the steamship *British Isles* filed its libel against the *Western Maid* upon a cause of collision. The libel states that the collision occurred on the 10th of January, 1919, in New York Harbor through the fault of the *Western Maid.* The United States attorney specially appearing for the purpose has filed a suggestion of want of jurisdiction for the reason that at the time of the collision the *Western Maid* was operated and controlled by the War Department, manned by a Navy Department crew, and had loaded at the port of New York a cargo of foodstuffs for the relief of the civilian population of Europe. The cargo was furnished by the War Department from emergency purchases made in the usual coordination with the United States Food Administration by authority of the President. The War Department loaded and shipped such supplies in the usual manner of transmission of quartermaster supplies, to be delivered in Europe to the chief quartermaster, American Expeditionary Forces, or to the United States Food Administration. The moneys paid for such supplies were paid out of the United States Treasury under appropriation made by the

act of Congress of February 14, 1919, for the relief of the civilian population of Europe.

On March 20, 1919, the vessel was delivered to the United States Shipping Board and was assigned by it to commercial service, in which service it was employed at the time of the arrest November 8, 1919.

While it is conceded by the United States attorney that under the provisions of section 9 of the shipping act of November 7, 1916, the vessel would be liable to seizure for maritime causes of action occurring after March 20, 1919, it is contended that the court has no jurisdiction *in rem* against the vessel for a collision which occurred while it was in Government service engaged in transporting, under the authority of the President by virtue of the act of Congress, supplies furnished by the Government for relief of civilian population of Europe.

It is not open to controversy as it was in *The Jeannette Skinner* (258 Fed. 768), that at the time of the arrest the vessel was "employed solely as a merchant vessel within section 9 of the Shipping Board act of September 7, 1916."

Upon the main controversy whether a collision occurring while in strictly public service raises a liability against the vessel until it is capable of enforcement either by reason of becoming a privately owned vessel or under the provisions of section 9 of the shipping act, the case is on all fours with the case of *Nippon Yusen Kabushiki Kaisha* v. *S. S. Jeannette Skinner* recently decided by Judge Rose. The authorities are carefully reviewed and discussed by him in his opinion (as yet unreported). Upon the authorities cited and the reasoning upon which Judge Rose reached his conclusion, in which I fully concur, it is held that the court had jurisdiction *in rem* at the

time of the arrest for liability incurred by the collision while the vessel was in the public service of the Government.

The suggestion of the district attorney is dismissed and the objection to jurisdiction overruled.

AMENDED LIBEL.

The amended libel and complaint of the British Petroleum Company (Ltd.) against the steamship *Western Maid*, her engines, boilers, etc., and all persons intervening herein in their interests, in a cause of collision, civil and maritime, alleged on information and belief and respectfully shows to this honorable court as follows. Filed Nov. 24, 1920.

To the honorable the judges of the United States District Court for the Eastern District of Pennsylvania:

First. That at and during all the times hereinafter mentioned your libellant was and still is a foreign corporation, organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, and having an office and place of business at Gresham House, 240 Broad Street, in the city of London, in England.

Second. That at and during all the times hereinafter mentioned your libellant owned and operated the steamship *British Isles*.

Third. That the steamship *Western Maid* is now or will be during the pendency of process herein within this district and within the jurisdiction of this honorable court.

Fourth. That at and during all the times hereinafter mentioned, and prior to and up to the time of the collision, hereinafter mentioned, the steamship *British Isles* was tight, staunch, strong, and in all respects seaworthy and properly manned and equipped.

Fifth. That on the 10th day of January, 1919, the steamship *British Isles* was lying at anchor in New

York Harbor off Stapleton, Staten Island. The weather was clear and there was a moderate breeze. The ship was swinging to the ebb tide and was well within the anchorage grounds. Her anchor lights were set and burning brightly. At about 9.35 p. m. the steamship *Western Maid* was observed approaching the steamship *British Isles* from the southward. As the *Western Maid* approached the *British Isles* those in charge of her apparently lost control of her engines, and her port bow collided with the starboard side of the *British Isles* seriously damaging the steamship *British Isles*.

Sixth. That the aforesaid collision and consequent damage were not caused or contributed to by any fault, neglect, or want of care on the part of the libellant or the said steamship *British Isles* or those in charge of her, but were wholly and solely due to the fault, neglect, and want of care of the steamship *Western Maid* and those in charge of her in the following, among other particulars, which will be pointed out upon the trial of this action:

1. In that the steamship *Western Maid*, being the moving vessel, did not keep clear of the steamship *British Isles*, which was at anchor.

2. In that the steamship *Western Maid* failed to maintain a proper and efficient lookout.

3. In that the steamship *Western Maid* failed to stop and reverse her engines when the danger of collision was or should have been apparent.

4. In that the steamship *Western Maid* was not in charge of a competent pilot, master, and crew.

5. In that those in charge of the steamship *Western Maid*, after the danger of collision was or should have been apparent, took no proper means to avoid same.

6. In that the steamship *Western Maid* failed to navigate with reference to the steamship *British Isles* in ample time to avoid colliding with her.

Seventh. By reason of the premises, your libellant has sustained damage in the sum of forty thousand ($40,000) dollars, as nearly as the same can now be estimated, no part of which has been paid, although duly demanded.

Eighth. All and singular these premises are true and within the admiralty and maritime jurisdiction of the United States and of this honorable court.

Wherefore libellant prays that process in due form of law, according to the course and practice of this honorable court in causes of admiralty and maritime jurisdiction, issue against the said steamship *Western Maid*, her engines, boilers, etc., and that all persons having or claiming any interest therein be cited to appear and answer all and singular the matters aforesaid; that this honorable court be pleased to decree to your libellant its damages, with interest and costs, and that the steamship *Western Maid*, her engines, etc., be condemned and sold to satisfy the same, and that your libellant may have such other and further relief as in law and justice it may be entitled to receive.

CONLEN, BRINTON & ACKER.
HARRINGTON, BIGHAM & ENGLAR,
Proctors for Libellant, 64 Wall Street,
New York City.

STATE OF NEW YORK,
County of New York, ss:

T. Catesby Jones, being duly sworn, deposes and says: That he is a member of the firm of Harrington, Bigham & Englar, proctors for the libellant herein; that he has read the foregoing libel and knows the

contents thereof and that the same is true to the best of his knowledge, information, and belief.

That the reason this verification is made by deponent and not by libellant is that libellant is a foreign corporation and none of its officers is now within this jurisdiction.

That the grounds of deponent's knowledge and the sources of his belief are documents in his possession and statements made to him by the libellant.

T. CATESBY JONES.

Sworn to before me this 25th day of October, 1920.

[SEAL.] JOSEPH L. CONNELL,
Notary Public.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, sct:

I, George Brodbeck, clerk of the District Court of the United States for the Eastern District of Pennsylvania, do hereby certify that the annexed and foregoing is a true and correct copy of the docket entries; libel in rem, filed Nov. 8, 1919; claim, filed Nov. 12, 1919; writ of attachment with marshal's return, filed Nov. 15, 1919; stipulation for release, in sum of $46,000, filed Nov. 20, 1919; suggestion of want of jurisdiction, with Exhibits A and B, filed Feb. 20, 1920; affidavit as to status of S/S *Western Maid*, filed May 19, 1920; opinion, Thompson, J., upon suggestion of want of jurisdiction, filed July 8, 1920; amended libel, filed Nov. 24, 1920; in the case of *British Tanker Company (Ltd.)*, v. *S/S Western Maid*, No. 77 of 1919, in admiralty; now remaining among the records of the said court in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said District

Court at Philadelphia, this fifteenth day of March, in the year of our Lord one thousand nine hundred and twenty-one and in the 145th year of the independence of the United States.

[SEAL.] GEORGE BRODBECK,
Clerk District Court United States,
Eastern District of Pennsylvania.
By GILBERT W. LUDWIG,
Deputy Clerk.

MEMORANDUM IN SUPPORT OF APPLICATIONS.

I.

STATEMENT OF CASE.

The *Western Maid* owned by the Government, while manned by the Navy and employed as an Army cargo transport carrying quartermaster's supplies abroad was in collision with the British steamship *British Isles*. Upon the *Western Maid's* release from transport service and her employment in merchant service, the owners of the *British Isles* filed a libel *in rem* against her to recover such collision damages. The Government promptly filed its suggestion representing that as the *Western Maid* was a commissioned vessel of the Navy and employed by her sovereign owner as an Army cargo transport serving military needs, she was immune from liability or lien for such collision and the District Court was without jurisdiction to hear and determine the merits of the libel. The District Court overruled the suggestion and assumed jurisdiction upon the theory that such collision impressed upon such Army transport a collision lien or liability, which, while then not enforceable, survived or lived with the vessel, and became enforceable upon and during her commitment to merchant service.

The Government denies jurisdiction in the District Court, (1) because inasmuch as at the time of the

collision the *Western Maid* was a transport, employed by her sovereign owner to serve military needs, she was immune from liability or lien for such collision damages; and (2) because such proceeding, in substance and effect, is an action against the Government for tort, arising out of a collision, alleged to have resulted from the incompetence or want of skill of naval officers commissioned to man the vessel and that for the liability for such losses, this Government has not consented to suit.

II.

Importance of question.

There are pending in the several district courts more than two hundred libel proceedings, involving many millions of dollars, in every one of which there is suggested the jurisdictional questions here presented. It is urgent and of public importance that such jurisdictional questions now be reviewed by this court.

III.

Classes of Government vessels.

A statement of the classes of vessels controlled by the Government during the war period is essential. They are: (*a*) armed public vessels; (*b*) unarmed public vessels; (*c*) merchant vessels.

(*a*) *Armed public vessels* consisted of Government owned or requisitioned and chartered vessels on the bare boat basis, of adaptable designs, which were converted into fighting ships. Included were tugs and smaller steamships equipped with mine-laying

and mine-sweeping devices which were employed in such operations. After the war the Government removed the fighting gear, reconditioned the vessels, and redelivered them to owners, who then obtained proper merchant licenses and placed them in merchant service.

(*b*) *Unarmed public vessels* consisted of Government owned or requisitioned and chartered vessels on the bare boat basis, which were converted into partially armed or unarmed transports—carriers of troops and of ammunition, food and clothing for the American Expeditionary Forces abroad. Many were employed as Army and Navy dispatch boats in and about the harbors. Vessels so requisitioned and chartered after the war had their Government gear removed, then were reconditioned and redelivered to owners, who obtained proper merchant licenses and placed them in merchant service. The *Western Maid, Carolinian,* and *Liberty* belong to this class.

(*c*) *Merchant vessels* consisted of Government owned or requisitioned vessels which were carriers of cargo and passengers for hire. The operation of each was a business enterprise designed for profit.

The jurisdictional questions now presented relate solely to vessels of classes (*a*) and (*b*), and not to vessels of class (*c*). The Government, by legislation, has waived its immunity with respect to merchant vessels, class (*c*) (*The Lake Monroe,* 250 U. S. 246), and has consented to suit. It has not waived immunity from liability or lien with respect to its armed or unarmed public vessels—classes (*a*) and (*b*).

IV.

Related Legislation.

Section 9 of the Shipping Board act of September 7, 1916 (c. 451, 39 Stat., 728, 730), creates liability when the service of Government vessels at the time of the collision is purely commercial. By the terms of the act, such vessels then become subject to the ordinary liabilities of merchant vessels notwithstanding the indirect interest of the Government. (*The Lake Monroe*, 250 U. S., 246.) Manifestly this act does not relate to armed or unarmed public vessels of classes (*a*) and (*b*).

As merchant vessels owned by the Government were subject to judicial processes, occasioning delays and requiring the Government to incur unnecessary expense in providing bonds to effect their release from attachment, the act of March 9, 1920 (c. 95, 41 Stat., 525), entitled "An act authorizing suits against the United States in admiralty, etc.," was passed. The act substituted process *in personam* against the Government in place of process *in rem* against its vessels. However, the act limited its scope of jurisdiction solely over matters arising out of the operation of vessels in merchant service.

Many vessels then were sold by the Government to private owners. Sections 1 and 2 of the act declared vessels exempt from arrest only while owned by the Government. To take care of liabilities alleged to have arisen during the period of Government operation and ownership, but sought to be

enforced against the vessels *in rem* after their sale and delivery to private owners, section 4 provided:

> That if a privately owned vessel not in the possession of the United States or of such corporation is arrested or attached upon any cause of action arising or alleged to have arisen from previous possession, ownership, or operation of such vessel by the United States or by such corporation, such vessel shall be released without bond or stipulation therefor upon the suggestion by the United States, through its Attorney General or other duly authorized law officer, that it is interested in such cause, desires such release, and assumes the liability for the satisfaction of any decree obtained by the libellant in such cause, and thereafter such cause shall proceed against the United States in accordance with the provisions of this act.

This section, however, did not enlarge the jurisdiction of the courts. The United States by filing such suggestion only "assumes the liability for the satisfaction of any decree obtained by the libellant in such cause." Such suggestions are claims for the vessels and effect the release of the vessels from arrest or attachment without filing bond or stipulation. In the *Carolinian* and *Eureka* cases suggestions under section 4 have been filed.

V.

The District Court was without jurisdiction.

The Government in all these cases has filed its suggestion of want of jurisdiction, wherein, after defining the status of the vessels at the time of the collisions, it declares their immunity from lien liabilities and denies jurisdiction in the district courts to hear and determine the merits of the libels.

Immunity of Government transports from liabilities or liens for collision torts.

The question thus presented is not one of immunity from process of the court, but one of immunity from liability for collision liens. The transports, by the happening of the collision, were exempt from the creation of any liability or lien against them. The doctrine of the immunity of the sovereign includes immunity from liability or lien.

Mr. Justice Holmes, in delivering the opinion of this court in *Kawananakoa* v. *Polyblank* (205 U. S. 349, 353), thus stated the doctrine:

> Some doubts have been expressed as to the source of the immunity of a sovereign power from suit without its own permission, but the answer has been public property since before the days of Hobbes (*Leviathan*, c. 26, 2). A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground *that there can be no legal right as against the authority that makes the law on which the right depends.*

Army transports serving military needs are part of the sovereign State, and their liabilities are merged in that of the sovereign State. Under such circumstances redress must be sought from the sovereign, and not from the instruments (vessels) it employs in military service. The law passes by the vessel and places the liability, if any, on the sovereign State alone and not upon its maritime instruments of sovereignty. The law is best stated by former Chief Justice Waite, then sitting on the Circuit Bench for the Southern District of New York, in *The Fidelity* 16 Blatchford, 569, 572, 573; 8 Federal Cases, 4758:

> A careful examination of the cases satisfied me that the exemption of public vessels from suits in admiralty arises not out of a want of power to sue the public owner, but out of a want of liability on the part of the vessel. A public vessel is part of the sovereignty to which she belongs and her liability is merged in that of the sovereign. Under such circumstances redress must be sought from the sovereign and not from the instruments he uses in the exercise of his legitimate functions. *Public creditors look to the public faith for their security and not to the public property.* But it is insisted that during the public ownership the maritime liability of the vessel may be incurred, although the remedy in admiralty is suspended. If this be so, the seamen employed on vessels of war, if their wages are not paid and their vessel is sold to private owners, to be employed in the ordinary business of commerce, may libel the vessel in the hands of

her private owners to secure their money. A simple statement of such a proposition is all that is required to show its fallacy. *The real truth is that in such cases the maritime law passes by the thing and places the liability on the sovereign owner alone and not upon the maritime instrumentalities of his sovereignty.* The cases of *The Davis*, 10 Wall. (77 U. S.) 15, and *The Siren*, 7 Wall. (74 U. S.) 152, are not at all in conflict with this. * * * I do not understand that *The Siren* and *The Davis, supra*, go further than to decide that the property of the Government not devoted to the public use is subject to such liens.

Pertinent observations made by the Court of Appeals of England in the *Parlement Belge* (4 Asp. M. C. at 234) are instructive:

Brett, L. J.:

> I doubt very much whether a maritime lien would attach to a vessel after leaving the Government service for damage done by her whilst in the service.

Baggley (p. 237):

> Suppose damage is done *by a ship of war* which is subsequently sold by the Government to a private individual, do you *say* that a lien would attach to her in the hands of her new owner for the damages done whilst a vessel of war?

Page 241:

> We think he (sovereign) can not be indirectly pleaded any more than he could be directly pleaded.

The argument of the King's advocate in the case of *The Prins Frederik* (2 Dods. 451), is sound and persuasive.

To conclude that the collision creates a lien liability of the vessels will permit, by indirection, the recovery of tort claims against the Government, which otherwise are without redress.

Liens can not be acquired or enforced upon or against public property.

> *Board of Commissioners* v. *O'Connor*, 86 Ind. 531, 537.
>
> *Rowley* v. *Conklin*, 89 Minn. 172, 175.
>
> *Briggs* v. *A Light Boat*, 7 Allen, 287, 297.

The rule of reason is that when a vessel enters upon her sovereign's public service, her identity is merged in her sovereign. When her devotion to public service ceases and she becomes an instrument in merchant service, she assumes a new personality—a merchant vessel—unhampered by any liens or claims alleged to have arisen against her during her public service.

This rule finds support in the fact that no reported cases, prior to the armistice, are known where foreign subjects or our own citizens, have attempted to recover collision damages inflicted by a public vessel, devoted to military service, by proceeding *in rem* against such vessel after she has been sold or released by the Government and placed in commercial service.

These Libels, in Substance and Effect, Are Actions Against the Government.

These libel proceedings, while filed *in rem* against vessels, in substance and effect, are actions against the Government and present claims for collision torts alleged to have resulted from the incompetence or want of skill or naval officers commissioned to man transports. For such liability this Government has not consented to suit. There is no distinction between suits against the United States and suits against its property. Suits against the property of the United States are in effect suits against the United States. (*Stanley* v. *Schwably*, 147 U. S. 508, 512.)

The Government is an indispensable party to any proceeding *in rem*, in which its public vessels are sought to be subjected to the payment of its obligations. (*Christian* v. *Atlantic & N. C. R. R.*, 133 U. S. 233, 241.)

VI.

Theory Upon Which District Courts Have Assumed Jurisdiction.

The District Courts have assumed jurisdiction solely upon the theory that the mere happening of the collision impressed upon such transports lien liabilities which, although then not enforceable, survived and lived by the vessel, and upon the vessel's commitment to merchant service, became enforceable. (See *The Jeannette Skinner*, 266 Fed. 396.) The correctness of the rule, as related to torts committed by vessels when privately owned and operated, is ad-

mitted. It ought not to apply when, at the time of the disaster, the vessel was an instrument of sovereignty.

Such lien, if it exists, is a *jus in re*. In theory it gives the injured party a proprietary interest in the offending vessel. Manifestly such collisions should not make foreigners co-owners with this Government, of its transports.

The District Courts have assumed that certain *obiter dicta* in *The Siren*, 7 Wall. (74 U. S.) 152, and *Workman* v. *New York City* (179 U. S. 552) support such ruling. *The Siren* is a prize case—the subject matter, forfeiture of a prize. The collision happened while the vessel was being brought into port, prior to her condemnation. Her captors, private persons, had a proprietary interest in the vessel, if condemned. Forfeiture and prize causes stand apart from the present questions of jurisdiction. The distinction observed by Chief Justice Waite in *The Fidelity, supra*, is the sound one:

> *The Siren* was a case of prize, and the question was, whether damages caused by a collision for which she was in fault, while on her way into port for adjudication, should be paid out of the proceeds of her sale on condemnation. No question of public use was involved. There was nothing to take it out of the general rule of the maritime law, except public ownership, and that, all will concede, is not enough. Property does not become a part of the sovereignty because it is owned by the sovereign. To make it so, it must be

devoted to the public use and must be employed in carrying on the operations of the Government. There may be some expressions of the learned justices who wrote the opinions in these cases (*Siren-The Davis*) which, if separated from the facts then under consideration, would indicate that the lien extended to public vessels employed in the public service, as well as to others; but the question was not up for determination, and it is proper, therefore, to confine the actual decision to the cases as they stand.

See *Carr* v. *United States*, 98 U. S. 433, 438.

This court, in *The Siren* case, declined to pass upon the question whether, if the maritime tort had been committed by a ship in possession of a prize crew and had been subsequently restored to owners, such claim then could be asserted by proceedings *in rem* against the vessel.

Workman v. *New York City*, *supra*, was a proceeding *in personam*, not *in rem*. The opinion limits its effect to just the exact facts then before the court. The vessel was a city owned boat.

VII.

The writs of prohibition and mandamus afford appropriate relief.

The propriety of this application is definitely settled.

Judicial Code, sec. 234.
The Lake Monroe, 250 U. S. 246.
United States v. *Peters*, 3 Dallas, 121.

In re Baiz, 135 U. S. 403.

Ex parte Indiana Transportation Co., 244 U. S. 456.

In re Metropolitan Trust Co., 218 U. S. 312.

VIII.

It is respectfully submitted that the motion for a writ of prohibition and/or a writ of mandamus should be granted and that a rule should be entered directing the Honorable J. Whitaker Thompson, judge of the District Court of the United States for the Eastern District of Pennsylvania, and the other judges and officers thereof to show cause why the writ of prohibition and/or the writ of mandamus should not issue as prayed for in said petition.

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Attorney General.
WILLIAM L. FRIERSON,
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J. FRANK STALEY,
HORACE T. ATKINS,
Special Assistants to the Attorney General.

MARCH 25, 1921.

○

Supreme Court of the United States.

October Term, 1951

No. Original.

In the Matter

of

UNITED STATES OF AMERICA, owner of the Steamship *Western Maid*, for a writ of prohibition and/or mandamus, petitioner,

—against—

HONORABLE J. WHITAKER THOMPSON, Judge of District Court of the United States for the Eastern District of Pennsylvania, and the officers of said Court.

BRIEF IN OPPOSITION TO THE PETITION.

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IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM—1921.

#21 Original.

In the Matter

of

UNITED STATES OF AMERICA, owner of the Steamship Western Maid, for a writ of prohibition and/or mandamus, petitioner,

—against—

HONORABLE J. WHITAKER THOMPSON, Judge of District Court of the United States for the Eastern District of Pennsylvania, and the officers of said Court.

BRIEF IN OPPOSITION TO THE PETITION.

Statement of the Case.

This is a petition by the United States that writs of prohibition and mandamus issue against the Hon. J. Whitaker Thompson, Judge of the United States District Court for the Eastern District of Pennsylvania on the ground that he is proceeding to hear a cause not within his jurisdiction.

The libel in the cause was filed on November 8, 1919, against the steamship Western Maid by the British Tankers Company, Ltd., to recover damages sustained by the British tank steamship British Isles while at

anchor on a lawful anchorage ground off Stapleton, Staten Island, New York Harbor, about 9:35 P. M. January 10th, 1919, as a result of a collision with the Western Maid.

On November 12th, 1919, the United States appeared, by its proctor, the United States Attorney for the Eastern District of Pennsylvania, and filed a claim for the Western Maid, "without admitting the jurisdiction of the said Court in the case, and without submitting the rights of the United States to the said jurisdiction." The vessel at that time was under attachment by the United States marshal (Record, page 29).

On November 20th, 1919, the United States Shipping Board Emergency Fleet Corporation filed a stipulation for value for the release of the vessel, and the stipulation was approved by the Court. The stipulation was signed by the Emergency Fleet Corporation, but not by the United States, the claimant. The stipulation, like the claim, recites that the United States reserves the right to raise the question of jurisdiction, but there is no reservation with respect to the liability of the United States Shipping Board Emergency Fleet Corporation.

No answer has been filed notwithstanding the rules of the Court provide that answers shall be filed within fifteen days, which in this case expired on November 23rd, 1919.

The suggestion of want of jurisdiction was not filed until February 20th, 1920 (Record, page 24, *et seq*), although the Government had stated in its claim that the vessel was owned by and was in the possession of the United States at the time of attachment. The suggestion recites that the Western Maid while in the course of construction at Portland, Oregon, was requisitioned by the United States Shipping Board Emergency Fleet, Corporation, as agent for the President; and that when the vessel was completed, she was registered in the name of the United States at the port of Portland, Oregon (Record, pages 23 and 24).

The Certificate of Registry (Exhibit B, attached to the suggestion), appears at pages 27 and 28 of the Record. It will be observed that the Certificate is an ordinary Certificate of Registry, issued by the Collector of Customs, for a merchant vessel, entitling her to engage in foreign trade. The certificate recites that it is issued in pursuance of Chapter One, Title XLVIII "Regulation of Commerce & Navigation," Revised Statutes of the United States. The description of the vessel in the Certificate is that of an ordinary cargo steamer and, in so far as her legal status as a vessel is concerned, it appears that, after she was registered, she was under the jurisdiction of the Department of Commerce, Bureau of Navigation (Record, page 28).

It is suggested in the brief filed on behalf of the Government that the Western Maid thereafter became an army transport. This assumption apparently rests on the fact that the Western Maid was "allocated" to the War Department. It is to be noted from the suggestion that the so-called "allocation" was "by the United States Shipping Board," and there is nothing in the record which suggests that the vessel was ever commissioned as an army transport, or ever changed her character as described in the Certificate of Registry, or, for that matter, ever passed from the jurisdiction of the Shipping Board. The fact that the ship was "allocated" by the Shipping Board shows that it was careful not to release its jurisdiction over her. Apparently the purpose of the "allocation" was to permit the Shipping Board to designate the service in which the vessel should engage. In passing it may be said that the so-called "allocation" took place on January 10th, 1919. The suggestion is not clear as to the exact hour of allocation, but it appears that it was after 1:00 P. M. on that day (Record, page 24). It appears further that the "allocation by the United States Shipping Board" to the War Department came to an end on March 20th, 1919.

The affidavit of Howard M. Smith, Assistant Secretary of the United States Grain Corporation (Record, page 29), filed by the Government on May 18th, 1920, in support of its suggestion shows that on January 10th, 1919, the Western Maid

> "Had loaded at the port of New York a cargo of flour and packing house products for the relief of the civilian populations of Europe, the said steamship Western Maid being bound for Falmouth, England, for orders."

Hence it appears that the cargo had been loaded on the Western Maid while she was a merchant vessel, the so-called "allocation" having taken place only a few hours before the collision.

The cargo was loaded on the Western Maid pursuant to arrangements made by Mr. Hoover, in accordance with authority received from the President of the United States. This authority was embodied in a document attached as Exhibit A to Mr. Smith's affidavit, and referred to in the record as memorandum received from Mr. Hoover November 16th, 1918. The document is dated November 12th, 1918, and is signed by the President. It is significant that the date is one day after the Armistice (Record, pages 31 and 32).

Mr. Smith, in his affidavit, says that the money to be paid for the cargo of the Western Maid at port of loading was to come out of an appropriation of $100,000,000.00 made by Congress in an Act approved February 14, 1919.* The collision occurred on January 10, 1919, or more than a month before the Act became law. A reference to Mr. Hoover's memorandum shows that the cargo of the Western Maid was to be sold to "populations which are now or have been under the domination of the Central Empires." The Act of February 25, 1919,

*So far as we can ascertain there is no Act dated February 14th. Apparently Mr. Smith had reference to the Act of February 25, 1919.

expressly limited the use of the $100,000,000.00 thereby appropriated so that no part of the fund should be used for the purchase of foodstuffs to be sent to territories then or lately under the domination of the Central Empires.

It definitely appears from Mr. Hoover's memorandum that on delivery of the cargo of the Western Maid to the buyer it was

> "To be paid for by the buyer." (Record, page 32.)

And it further appears from Mr. Hoover's memorandum:

> "That, if it proves infeasible to reship or redirect the steamers to the territories lately held by the Central Empires, Mr. Hoover will make arrangements for the resale of the foodstuffs to the Allied Governments, or alternatively to the Belgian Relief."

None of the documents filed by the Government discloses at what price the food products were to be sold, nor whether the Government made a profit on the transaction. It appears clearly, however, that the Government was engaged in the buying and selling of merchandise, and, beyond the bald statement of the United States Attorney in his suggestion, there is nothing in the record which would warrant the statement that the Western Maid was at any time used as an army transport.

It is stated by Mr. Smith, in his affidavit, that the Grain Corporation had paid no freight, but it is not disclosed whether the goods were sold at the prevailing market price at destination or at a price computed on cost, plus charges, such as cost of carriage, insurance, etc. Moreover, the bill of lading indicated that freight was to be paid.

The mere fact that the vessel was manned by a naval

crew has no significance, because it does not appear that she was at any time commissioned as a Navy vessel or that she performed any service for the Navy Department. (Record, pages 24 and 25.)

The Honorable J. Whitaker Thompson, against whom the Writ of Prohibition is sought, says in his return (page 2) that

> "It was not made to appear to the Court otherwise than as appears from the statements contained in the suggestion of want of jurisdiction, that the steamship Western Maid was employed at the time of the collision in the furtherance of military operations.
>
> * * * * * *
>
> "In the affidavit of Howard M. Smith, and the memorandum of Herbert Hoover, filed by the United States of America, with and as a part of its Suggestion of Want of Jurisdiction herein, it appeared that the steamship Western Maid was employed at the time of the collision, to wit, January 10, 1919, in the carriage of flour and packing house products, purchased by the War Department in co-ordination with the United States Food Administration and intended to be sold to the civil populations of Europe."

The amended and supplemental return of Judge Thompson incorporates copies of the bill of lading and manifest of the Western Maid covering the cargo on board at the time of the collision and shows that the Government submitted these copies in support of its suggestion. The bill of lading acknowledges receipt of the cargo from the Food Administration Grain Corporation, and recites that it is to be carried to destination as ordered on arrival Falmouth, England, and to be delivered there to the Food Administration Grain Corporation, or assigns. The following words are written on the bill of lading:

"Freight as Agreed".

The manifest names the Food Administration Grain Corporation as both consignor and consignee.

It is respectfully submitted that the case presented is not that of a warship or public vessel, duly commissioned as such, coming into collision with a privately owned ship, but a case of a collision between a privately owned ship and a Government owned ship engaged in carrying cargo to be sold as merchandise to enemy aliens, or, failing to find purchasers among enemy aliens, to be sold to friendly aliens.

When the case came on for hearing, Judge Thompson said that

> "It is not open to controversy as it was in *The Jeanette Skinner* (258 Fed. 768), that at the time of the arrest the vessel was employed solely as a merchant vessel within Section 9 of the Shipping Board Act of September 7, 1916."

He then held that (Record, page 36):

> "The Court had jurisdiction *in rem* at the time of the arrest for liability incurred by the collision while the vessel was in the public service of the Government."

This suit was originally instituted under section 9 of the Shipping Board Act of 1916. After the suit was brought, Congress passed the Suits in Admiralty Act, of March 9th, 1920. The Court will note that, by the terms of the Act of 1916, the vessel can only be proceeded against when purchased, chartered or leased from the Shipping Board, whereas the Suits in Admiralty Act permits suits against the United States whenever a Government vessel is employed as a merchant ship. In the present case the Western Maid was admittedly chartered from the Board at the time the suit was

begun, and we think that the facts in this case are broad enough to establish that she was also chartered from the Board at the time of the collision. Irrespective of this consideration, however, the suit could be brought against the United States under the Act of March 9th, 1920. The Western Maid was a merchant ship, not only at the time suit was brought, but also at the time of the collision. The distinction, in this respect, which the Government is attempting to make, is unimportant, but conceding all that the Government says, the present case meets the rigid requirements upon which counsel for the Government insist.

I

The Government concedes that the Western Maid, at the time of her arrest, was subject to suit.

The Government concedes, in the memorandum filed in this Court with its petition for a writ of prohibition, that

> "The question thus presented is not one of immunity from process of the Court, but one of immunity from liability for collision liens." (Government's Memorandum with Petition, p. 47.)

Indeed, under the decision of this court in *The Lake Monroe*, 250 U. S. 256, no other conclusion could have been reached. As was stated by Judge Thompson, it was not open to controversy that the Western Maid, at the time of her arrest, was employed solely as a merchant vessel under section 9 of the Shipping Board Act of September 7th, 1916.

II

The Western Maid was a merchant vessel at the time of the collision.

The Government's suggestion shows that the Western Maid was a carrier of merchandise which was "to be paid for by the buyer" (Record, p. 32). Certainly it cannot be said that the sale of foodstuffs to enemy aliens is a necessary function of the sovereign. Indeed, the action of Congress, in providing that the funds appropriated by it should be limited to the

> "Furnishing of foodstuffs and other urgent supplies, and for the transportation, distribution and administration thereof, to such populations in Europe and countries contiguous thereto outside of Germany, German Austria, Hungary, Bulgaria and Turkey." (Act Feb. 25, 1919, 40 Stats. at L. 1161.)

indicates that Congress was of opinion that it was unwise for the Government to engage in trade with enemy populations. Moreover, it is open to serious doubt whether it is constitutional for this Government to engage in transporting foodstuffs to be offered for sale at destination. By this we do not mean to suggest that the Government could not buy foodstuffs for consumption either by its forces or others engaged in its service, or for the relief of famine stricken districts, but we do urge that, when the foodstuffs are bought for the purpose of resale, there is a serious question whether the officers of the Government can legally engage in such business. A similar doubt was expressed in argument in the case of The American Government Ship Coelleda, VI Lloyds List Law Reports 268, February 14, 1921. As we understand the situation, the officers of the Federal Government had a like doubt, and it was for this reason that a corporation was formed, known

as the Food Administration Grain Corporation, name later changed to the United States Grain Corporation, under the general corporation laws of the State of Delaware. The fact that the Government considered it either necessary or expedient to organize such corporations, indicates that the business in which they were to engage was essentially of a private, rather than of a governmental or sovereign character, and that it was the intention to avoid committing this Government to the theory that such activities were properly governmental or sovereign activities. See Charles G. Fenwick, Political Systems in Transition, page 201.

This Court, in *United States* v. *Strang*, 254 U. S. 491, said that

> "Generally agents of a corporation are not agents of the stockholders and cannot contract for the latter. Apparently this was one reason why Congress authorized organization of the Fleet Corporation" (citing authorities).

See also:

> *United States S. B. Emergency Fleet Corp.* v. *Wood*, 274 Fed. 893 (C. C. A. 2nd Circuit, June 15, 1921).

In this connection, we call the Court's attention to the fact that the food products constituting the cargo of the Western Maid were purchased by the War Department through the Food Administration, and also to the fact that the affidavit supporting the Government's suggestion is made by the Assistant Secretary of the United States Grain Corporation, successor to the Food Administration Grain Corporation, rather than by an officer of the Government.

The collision took place two months after the Armistice. We submit that, under such circumstances, the Western Maid, at the time of the collision, could in no

event be called a vessel engaged in a military operation. In any event, the Government has the burden of proof to establish that the Western Maid was a public vessel engaged in a military operation. *Ex parte Muir*, 254 U. S. 552.

The United States attorney submitted to Judge Thompson a copy of the ship's bill of lading, in which the Food Administration Grain Corporation was named as consignor, "destination as ordered on arrival Falmouth, England." (Supplemental Return.) The shipment was made subject to "the charter party or agreement between the War Department of the United States and the United States Shipping Board applicable to this vessel." "Freight as agreed." It thus appears that the Western Maid had all the documents aboard usually carried by a merchant ship, viz., a certificate of registry, a manifest and a bill of lading.

It is submitted, however, that, even if it were a fact that no freight was to be paid for the carriage, this circumstance would not affect the case. Years ago it was a common thing for a merchant to load a vessel and send her abroad with his own goods to be sold. During the war period, and thereafter, this old practice was revived. The mere fact that the ship and goods were owned by the same person did not change the character of the ship from that of a merchant vessel. She was carrying goods which were intended for commerce. So, in this case, although both the Western Maid and her cargo were owned by the Government, it was intended that her cargo was to be sold to the civilian population of Europe. It follows that the Western Maid was a merchant vessel.

In re Jupp, 274 Fed. 494, 495.

In *The Exchange*, 7 Cranch. 116, the United States attorney who appeared on behalf of Napoleon, the Emperor of the French, was careful to bring into court

the original commission of the captain of the ship. The Exchange had been owned by American citizens who, when the ship put into an American port filed a libel for possession. Chief Justice Marshall at page 146 of his opinion said:

> "In the present state of the evidence and proceedings, the Exchange must be considered as a vessel, which was the property of the libellants, whose claim is repelled by the fact that she is now a national armed vessel, *commissioned by*, and in the service of the Emperor of the French." (Italics ours.)

There is no suggestion that the Western Maid was commissioned. On the contrary the record shows that she was registered as a merchant ship, and, in view of the fact that the certificate of the Collector of Customs at Portland attesting that the copy attached to the sugge tion is a true copy of the original on file in his office, is dated February 24th, 1920, it is to be inferred that at the time of the collision the Western Maid was operating under this Registry, R. S. 4170, 4171 (Navigation Laws of the United States, 1919, p. 41).

III

Congress, by the Act of March 9, 1920, has waived immunity as to merchant vessels. The effect of Section 3 of this Act is to make this cause a suit under that Act.

The United States Shipping Board Emergency Fleet Corporation filed a stipulation for value in this case, but the Attorney General has not as yet filed the suggestion contemplated by Section 3 of the Suits in Admiralty Act. The latter part of Section 3 of that act is as follows:

> "Neither the United States nor such corporation (Shipping Board Emergency Fleet Corpora-

tion) shall be required to give any bond or Admiralty stipulation in any proceeding brought hereunder. Any such bond or stipulation heretofore given in Admiralty cases by the United States, the United States Shipping Board, or the United States Shipping Board Emergency Fleet Corporation, shall become void and be surrendered and cancelled upon the filing of a suggestion by the Attorney General or other duly authorized law officer that the United States is interested in such cause, and assumes liability to satisfy any decree included within said bond or stipulation, and thereafter any such decree shall be paid as provided in Section 8 of this Act."

The libellant in this case is entirely willing that the Attorney General shall file his suggestion that the United States is interested in the case.

It is submitted that the Congress left to the Attorney General only the ministerial duty of filing such a suggestion.

Mississippi v. *Johnson*, 4 Wall. 475;
Kendall v. *United States ex rel. Stokes*, 12 Peters, 524;
Lower v. *United States ex rel. Marcy*, 91 U. S. 536;
Roberts v. *United States ex rel. Valentine*, 176 U. S. 221;
United States ex rel. Steinmetz v. *Allen*, 192 U. S. 543.

The effect of Section 3 of this Act is to place litigants, who had proceeded under the Act of 1916 and in whose cases stipulations had been filed by the Emergency Fleet Corporation, in the same position as if the suits had been brought under the Suits in Admiralty Act. The mere fact that the Attorney General has failed to do what the Congress intended that he should have done, does not change the situation. Congress, of course,

has the power to waive the immunity Government's attorneys seek as a shield in this case. We submit, that in so far as the Western Maid is concerned, it has done so. Not only does this appear from the plain language of the statute, but it appears that, when Congress was discussing this statute in Committee, the stipulation which was filed in this case was referred to by Charles F. Dutch, Esq., Admiralty Counsel for the Shipping Board, as one of the obligations of the Emergency Fleet Corporation of which the Fleet Corpoartion would be relieved by the inclusion of Section 3 in that act. (Hearing before the Committee on the Judiciary, Sixty-sixth Congress, First Session, on The Attorney General's substitute for S. 3076 and H. R. 7124, page 47.)

It is submitted for the foregoing reasons that, on the facts of this case, irrespective of the considerations which we shall now proceed to call to the Court's attention, the District Court has jurisdiction.

We have shown that the Western Maid was a merchant ship at the time of the collision and that the Congress, by the act of March 9, 1920, has expressly waived immunity in respect of such ships.

For this reason, if no other, the petition for the writs should be denied.

IV

If, however, we assume that the Western Maid was a public vessel at the time of the collision, nevertheless a claim in favor of the libellant was created against her at that time. Although the claim could not then be enforced, it existed, and, when the vessel became generally subject to suit, could be enforced by suit in rem.

Under the Maritime law, when a vessel negligently collides with another vessel, a claim is created against the vessel at fault in favor of the injured party.

See *The Siren*, 7 Wallace, 152, 155, 156, 158, where this Court said:

> "For the damages occasioned by collision of vessels at sea, a claim is created against the vessel in fault, in favor of the injured party. This claim may be enforced in the Admiralty by a proceeding *in rem*, except where the vessel is the property of the United States. In such case, the claim exists equally as if the vessel belonged to a private citizen, but, for reasons of public policy, already stated, cannot be enforced by direct proceedings against the vessel. It stands, in that respect, like a claim against the Government, incapable of enforcement without its consent and unavailable for any purpose. * * * The inability to enforce the claim against the vessel is not inconsistent with its existence. * * * A claim or lien existing and continuing will be enforced by the courts whenever the property upon which it lies becomes subject to their jurisdiction and control."

The facts in *The Siren* were as follows:

The steamer Siren was captured by the United States Navy steamer Gladiolus at Charleston while she was attempting to run the blockade of that port. She was placed in charge of a prize master and crew, and ordered to proceed to Boston for adjudication. She put into New York for coal and, while passing through Hellgate, ran into and sank the sloop Harper, laden with iron. This court held that the collision resulted from the fault of the Siren. When the Siren arrived at Boston a libel in prize was filed against her and she was condemned and sold. The proceeds of sale were deposited with the Assistant Treasurer of the United States, subject to the order of the court. The owner of the Harper and the owners of her cargo intervened by a petition and asserted a claim upon the Siren and her proceeds for the damages sustained by them as a result of the collision. The District Court held that the

intervention could not be allowed, and dismissed the petition. On appeal this court held that the intervention was proper, reversed the decree of the District Court, directed that the damages sustained by the petitioners be assessed, and that they be paid out of the proceeds before distribution to the captors. It was subsequently held in *The Siren*, 13 Wallace, 389, that "the capture enured exclusively to the benefit of the United States."

The Government, in its brief, says that the language which we have quoted is a dictum. We are unable to agree with this statement. An examination of the opinions in the *Siren* case discloses that Mr. Justice Nelson dissented on the ground upon which the Government relies in this case. He said:

> "If the owner of the offending vessel is not liable at all for the collision, it follows, as a necessary legal consequence, that there can be no lien, otherwise the non-liability would amount to nothing" (7 Wall. 164).

When the members of this Court, in face of a single dissent, make a doctrine one of the principal grounds for the Court's decision, such a doctrine can hardly be called a dictum.

The Government suggests that, because the Siren was a prize, that case is distinguishable. We submit that this conclusion does not follow. Mr. Lord, in an article published in 19 Columbia Law Review, page 477 (December, 1919), says:

> "The authority of the Siren has never been questioned. We may regard the Siren as a Government ship, since the decision that she was a lawful prize dated back to the time of her capture. She was in the possession of the Government at the time of the collision. If the United States could have had her condemned, without hearing in court, the Siren would have been libel-proof."

Mr. Justice Nelson, in his dissenting opinion (7 Wall. page 163) says:

> "The steamer Siren, having been captured by the United States steamship Gladiolus, a Government vessel of war, *jure belli* became the property of the United States subject only to the right of the claimant to have the question of the legality of the capture determined by the prize court to which it was sent for condemnation. Captures made by Government vessels belong to the Government, and no title exists in the captors except to their distributive shares of the proceeds after condemnation (*Dos Hermanos*, 10 Wheaton, 306; *The Aigburth*, *Blatchford's Prize Cases*, 635; *The Adventure*, 8 Cranch, 226)."

As we view the case, The Siren was a decision directly in point.

The proposition relied upon by Mr. Justice Nelson as a ground for his dissent, viz. that, if an owner of an offending vessel is not liable, as the legal consequence, it follows that there can be no lien, is contrary to the decisions of this Court in *The China*, 7 Wallace, 53, and in many other cases.

Mr. Justice Gray, in *Ralli* v. *Troop*, 157 U. S. 386, 402, says:

> "That decision (referring to *The China*, 7 Wallace, 53) proceeded, not upon any authority or agency of the pilot, derived from the civil law of master and servant, or from the common law, as the representative of the owners of the ship and cargo; nor upon the law of contribution in general average as between them; but upon a distinct principle of the maritime law, namely, that the vessel, in whosesoever hands she lawfully is, is herself considered as the wrongdoer, liable for the tort, and subject to a maritime lien for the damage" (7 Wallace, 68).

This Court, in numerous other decisions, has time and time again emphasized this principle. *The Black-*

heath, 195 U. S. 361; *Tucker* v. *Alexandroff*, 183 U. S. 424; *The Palmyra*, 12 Wheaton, 1; *The Brig Malek Adhel*, 2 Howard, 219; *The John G. Stevens*, 170 U. S. 122; *The Barnstable*, 181 U. S. 464-467.

Liability *in rem* is entirely independent of liability *in personam*. See *Homer Ramsdell* v. *Compagnie General Transatlantique*, 182 U. S. 416, where it was held that the owner of a vessel which was in charge of a compulsory pilot was not liable personally for a collision, although, as in *The China*, the vessel herself would be so liable; and, in *The Barnstable*, *supra*, page 467, this Court said:

> "Whatever may be the English rule with respect to the liability of a vessel for damages occasioned by the neglect of the charterer, as to which there appears to be some doubt, *The Ticonderoga*, Swabey, 215; *The Lemington*, 2 Asp. Mar. Law Ca. 475; *The Ruby Queen*, Lush. 266; *The Tasmania*, 13 P. D. 110; *The Parlement Belge*, 5 P. D. 197; *The Castlegate* (1893), App. Ca. 38, 52; *The Utopia* (1893), App. Cas. 492, the law in this country is entirely well settled, that the ship itself is to be treated in some sense as a principal, and as personally liable for the negligence of any one who is lawfully in possession of her whether as owner or charterer. *The Little Charles*, 1 Brock. 347, 354. It was said by this Court in the case of *The Palmyra*, 12 Wheat. 1, 14, referring to a seizure in a revenue case: 'The thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing; and this whether the offence be *malum prohibitum* or *malum in se*. The same principle applies to proceedings *in rem*, on seizure in the admiralty.' So in *United States* v. *Brig Malek Adhel*, 2 How. 210, speaking of a forfeiture incurred by a piratical aggression, Mr. Justice Story remarked (p. 233): 'That the act makes no exception whatsoever, whether the aggression be with or without the co-operation of the owners. The vessel which commits the aggression is treated

> as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner * * * It is not an uncommon course in the admiralty, acting under the law of nations, to treat the vessel in which, or by which, or by the master or crew thereof, a wrong or offence has been done, as the offender, without any regard whatsoever to the personal misconduct or the personal responsibility of the owner thereof.' This was the principle upon which this Court held, in the case of *The China*, 7 Wall. 53, that a vessel was liable for a collision occasioned by the fault of a compulsory pilot—a marked distinction from the English rule, which, by statute, exempts the vessel from such consequences."

And in *Tucker* v. *Alexandroff*, Mr. Justice Brown, referring to a warship of the Russian Navy, said (at page 424):

> "A ship is born when she is launched and lives so long as her identity is preserved. Prior to her launching, she is a mere congeries of wood and iron—an ordinary piece of personal property—as distinctly a land structure as a house, and subject to mechanics' liens created by State law and enforcible in the State Courts. In the baptism of launching, she receives her name, and, from the moment her keel touches the water, she is transferred and becomes a subject of admiralty jurisdiction. She acquires a personality of her own; becomes competent to contract and is individually liable for her obligations upon which she may sue in the name of her owner, and be sued in her own name. Her owner's agents are not her agents and her agents are not her owner's agents (citing cases).
>
> She is capable, too, of committing a tort, and is responsible in damage therefor. She may also become a quasi bankrupt; may be sold for the payment of her debts and thereby receive a complete discharge from all prior liens, with liberty to begin life anew, contract further obligations and perhaps be subjected to a second sale."

The Government has stressed *The Parlement Belge*, L. R. 5 P. D. 179, an English case, as an authority for its position. Because of the difference between the conception of the liability of a ship, under the English Law, and that under the American Law, the English authorities are not in point. This distinction is clearly stated in the authorities which we have just quoted. For this reason, under English Law, property owned by a sovereign, although not in his possession, is immune. Such, however, is not the American Law, *The Davis*, 10 Wall., 15. This is well put by Judge Ward, of the Circuit Court of Appeals for the Second Circuit, in *The Carlo Poma*, 259 Fed., 369, 370, where he said:

> "The English Courts go the whole way in refusing process against property of a foreign sovereign under any circumstances. This because of the international comity due from one sovereign to another. *The Parlement Belge*, Law Reports, 5 P. D., 197; *The Jassy* (1906) P. 270.
>
> "The law of the United States is the same, *except that the immunity of property of a sovereign, depends, not merely upon the ownership, but also upon the actual possession at the time process is served.*"
>
> *The Davis*, 10 Wall. 15, 19 L. Ed. 875;
> *Long* v. *The Tampico*, (D. C.) 16 Fed. 491;
> *The Attualita*, 238 Fed. 909, 152 C. C. A. 43.
> (Italics ours.)

But, even in England, it is settled, as was said by this Court in *Workman* v. *New York City*, 179 U. S. 552, 556, that a collision imprcses a liability on a public vessel which becomes enforcible when the crown waives the immunity of the public vessel from remedy or suit. In the *Workman* case, Mr. Justice White, delivering the opinion of the Court, said (at page 556):

> "As no warrant issues in these cases for the arrest of the vessels of the crown, and no bail is given on the appearance, it is insisted that they

> are brought simply to ascertain the extent of the damages, and that the decrees are little more than awards, so far as the Government is concerned. This may be the only results of the suits, BUT THEY ARE INSTITUTED AND CONDUCTED ON THE HYPOTHESIS THAT CLAIMS AGAINST THE OFFENDING VESSELS ARE CREATED BY THE COLLISION. *The Clara*, 1 Swabey, 3 and *The Swallow*, 1 Swabey 30." (Capitals ours.)

The Ticonderoga, 1 Swabey Adm. Rep. 215, (Dr. Lushington) and *Fletcher* v. *Braddick*, 2 Bos. & P. (N. R.) 182 (Lord Mansfield), expressly hold that a collision creates a lien or liability against a public vessel or warship. In both these cases the Courts enforced such a lien after the vessel had come into private hands.

In *The Davis*, supra, it was held that personal property of the United States on board a vessel for transportation from one point to another is liable to a lien for salvage services rendered in saving the property. It was there said (10 Wall. 19):

> "There are some expressions in the opinion of this court in the case of *The Siren*, which seem to imply that no suit *in rem* can be instituted against property of the United States under any circumstances. But a critical examination of the case and the reasoning of the court, will show that that question was not involved in the suit, and that it was not intended to assert such a proposition without qualification. In that case a prize, after capture and before condemnation, had collided with another vessel and was in fault, and it was held that as the government had brought the prize into the court for condemnation, and was before the court as plaintiff, and had placed the *res* in possession of the court, the lien for the damages growing out of the collision could be enforced against the United States. It was not, therefore, necessary to define all the circumstances under which the court, having control of the *res*, might en-

force a lien on property of the United States; and the learned judge who delivered the opinion cites with approval the case of *The Light Boats*, in 11 Allen, in which *the doctrine is laid down and well supported that proceedings in rem to enforce a lien against property of the United States are only forbidden in cases where, in order to sustain the proceeding, the possession of the United States must be invaded under process of the court. With the principle as thus stated we agree, and do not see in it anything inconsistent with the case of The Siren.*" (Italics ours.)

In *Workman* v. *New York City*, 179 U. S. 552, 566, Mr. Justice White, delivering the opinion of this court, discusses at length the law relating to the liability of public vessels. He says:

"We, of course, concede that where maritime torts have been committed by the vessels of a sovereign, and complaint has been made in a court of admiralty, that court has declined to exercise jurisdiction, but this was solely because of the immunity of sovereignty from suit in its own courts. So also, where, in a court of admiralty of one sovereign, redress is sought for a tort committed by a vessel of war of another nation, it has been held that as by the rule of international comity the sovereign of another country was not subject to be impleaded, no redress could be given. Both of these rules, however, proceed upon the hypothesis of the want of a person or property before the court over whom jurisdiction can be exerted. As a consequence, the doctrine above stated rests not upon the supposed want of power in courts of admiralty to redress a wrong committed by one over whom such courts have adequate jurisdiction, but alone on their inability to give redress in a case where jurisdiction over the person or property cannot be exerted. In other words, the distinction between the two classes of cases is that which exists between the refusal of a court to grant relief because it has no jurisdiction to do so, and the failure of a court to afford redress

in a case where the wrong is admitted and jurisdictional authority over the wrongdoer is undoubted.

The decisions of this court clearly expound the principles we have stated. *The Exchange* (1812), 7 Cranch, 116, involved the right of a court of admiralty to enforce, by a proceeding *in rem*, an alleged maritime claim against a vessel of war of a foreign nation. The right to relief was denied exclusively because of a want of jurisdiction over the foreign sovereign or his property.

The Siren (1869), 7 Wall. 153, involved the liability of a prize ship in the possession and control of the officers of the United States for an injury inflicted by a collision of the ship with another vessel, averred to have been occasioned by the negligent management of those in charge of the prize ship. In considering the power of the court to adjudicate the controversy, the court said (p. 185):

'For the damages occasioned by collision of vessels at sea a claim is created against the vessel in fault, in favor of the injured party. This claim may be enforced in the admiralty by a proceeding *in rem*, except where the vessel is the property of the United States. In such case the claim exists equally as if the vessel belonged to a private citizen, but for reasons of public policy, already stated, cannot be enforced by direct proceedings against the vessel. It stands, in that respect, like a claim against the government, incapable of enforcement without its consent, and unavailable for any purpose.'

In England, when the damage is inflicted by a vessel belonging to the crown, it was formerly held that the remedy must be sought against the officer in command of the offending ship. But the present practice is to file a libel *in rem*, upon which the court directs the registrar to write to the Lords of the Admiralty requesting an appearance on behalf of the crown—which is generally given—when the subsequent proceedings to decree are conducted as in other cases. Coote's New Admiralty Practice, 31. In the case of *The Athol*, 1 W. Robinson, 382, the court refused to issue

a monition to the Lords of the Admiralty to appear in a suit for damage by collision, occasioned to a vessel by a ship of the crown; but the lords having subsequently directed an appearance to be entered, the court proceeded with the case, and awarded damages. As no warrant issues in these cases for the arrest of the vessels of the crown, and no bail is given on the appearance, it is insisted that they are brought simply to ascertain the extent of the damages, and that the decrees are little more than awards, so far as the government is concerned. This may be the only results of the suits, but they are instituted and conducted on the hypothesis that claims against the offending vessels are created by the collision. *The Clara*, 1 Swabey, 3, and *The Swallow*, 1 Swabey, 30. The vessels are not arrested and taken into custody by the marshal, for the reasons of public policy already stated, and for the further reason that it is to be presumed that the government will at once satisfy a decree rendered by its own tribunals in a case in which it has voluntarily appeared.'

As the prize vessel had been condemned and sold at the instance of the United States, and the proceeds were in the registry of the Court for distribution, the court gave the relief sought against the proceeds of the sale, because the facts stated established, not only the liability of the offending ship, but also furnished the basis of jurisdiction.

The same principle was applied in the later case of *The Davis*, (1869) 10 Wall. 15, where it was held that personal property of the United States on board of a vessel for transportation from one point to another was liable to a lien for salvage service rendered in saving the property from a peril of the sea, and that such lien might be enforced by a proceeding *in rem*, when the process of the court might be used without disturbing the possession of the government.

The statement of the maritime law of England on the subject now being considered made in *The Siren*, *supra*, makes it clear that, in harmony with the maritime law of this country, THE FACT THAT A WRONG HAS BEEN COMMITTED

BY A PUBLIC VESSEL OF THE CROWN AFFORDS NO GROUND FOR CONTENDING THAT NO LIABILITY ARISES, BECAUSE OF THE PUBLIC NATURE OF THE VESSEL, although, it may be, in consequence of a want of jurisdiction over the sovereign, redress cannot be given. This is well illustrated by the cases to which we shall now refer.

The Athol, (1842) 1 Wm. Rob. 374, was the case of a British troopship which had run down a brig in the English Channel. The Lords of the Admiralty having refused a petition for compensation, the owner of the brig applied to the High Court of Admiralty to decree a monition to issue against those officials. In declining to issue the monition, for want of power, Dr. Lushington said (page 382):

'Under the circumstances of this case then, both upon principle and the authority of decided cases, I must decline to issue the monition as prayed. At the same time, sitting here as a judge, in a court of justice, I am bound to express the opinion that I cannot apprehend the high personages who represent Her Majesty in her office of Admiralty, will avoid doing justice, or that, upon a due consideration, they will take upon themselves to say, that they will be themselves the exclusive judges upon the merits of the present case. Whether they shall appear or not, is not a matter for this court to determine. I decline to grant the monition.'

The Lords of the Admiralty subsequently directed that an appearance should be made on behalf of *The Athol*, and as by this act the court had jurisdiction to determine the controversy, it did so, held *The Athol* to have been in fault, and, despite the public nature of the vessel, 'the damages and costs were pronounced for.'

The Parlement Belge, (1879) 4 P. D. 129, was an action instituted on behalf of the owners of a steam tug against the steamship Parlement Belge and her freight to recover damages sustained by the tug in a collision with the steamship. The latter vessel was, at the time of the collision and when the action was instituted, a public vessel of

the Government of the sovereign state of Belgium, navigated and employed by and in the possession of such government, and officered by officers of the royal Belgium navy, holding commissions from His Majesty, the King of Belgium, and in the pay and service of his government. Besides carrying the mails, between Dover and Ostend, the Parlement Belge carried passengers and merchandise, and was employed in earning passage money and freight. Sir Robert Phillimore declared (p. 144) that the case was one of first impression, and to be decided upon general principles and the analogies of law rather than upon any direct precedent, and it was held that the Parlement Belge did not come within the category of a ship of war or a pleasure vessel belonging to the crown of Belgium, and was not exempt from the process of the court. On appeal, however (5 P. D. 197), it was held that the admiralty court was concluded by the declaration of the sovereign authority that the vessel was a public vessel of the state, and, further, that the mere fact of the ship having been used subordinately for trading purposes did not take away the immunity attaching to the public vessel of an independent sovereignty, and that the vessel could not be proceeded against.

It results that, in the maritime law, THE PUBLIC NATURE OF THE SERVICE UPON WHICH A VESSEL IS ENGAGED AT THE TIME OF THE COMMISSION OF A MARITIME TORT AFFORDS NO IMMUNITY FROM LIABILITY IN A COURT OF ADMIRALTY, where the court has jurisdiction. This being so, it follows that as the municipal corporation of the city of New York, unlike a sovereign, was subject to the jurisdiction of the court, the claimed exemption from liability asserted in the case at bar, because of the public nature of the service upon which the fire-boat was engaged—even if such claim for the purposes of the case be conceded—was without foundation in the maritime law, and therefore afforded no reason for denying redress in a court of admiralty for the wrong which the courts below both found to have been committed."

Counsel for the Government say that, as *The Workman* case was an action *in personam*, it is not an authority in the present case, and refer to the fact that the decision was recently considered by this court in *Ex parte Walsh*, Advance opinions, Supreme Court, decided June 1st, 1921, which also was an action *in personam*. In that case this court, speaking through Mr. Justice Pitney, said:

> "Much reliance is placed upon *Workman* v. *New York City*, 179 U. S. 552. That case dealt with a question of the substantive law of admiralty, not the power to exercise jurisdiction over the person of the defendant; and, in the opinion, the court was careful to distinguish between the immunity from jurisdiction attributable to a sovereign upon the ground of policy, and the immunity from liability in a particular case"

It is just this distinction, so clearly stated by Mr. Justice Pitney, that the Government, throughout its brief, fails to recognize.

The present suit is *in rem*, and as Judge Thompson says, in his opinion, it is conceded by the Government that the court had jurisdiction of the vessel at the time the libel was filed and the arrest made. Consequently the situation presented here is wholly different from that in the *Walsh* case.

The doctrine of The Davis and The Siren has long been familiar to the Federal courts.

> *The Tampico*, 16 Federal 491;
> *Thompson* v. *City of Chicago*, 79 Federal 984;
> *Johnson Lighterage Company No. 24*, 231 Fed. 365;
> *The Attualita*, 238 Federal 909;
> *The Luigi*, 230 Federal 493;
> *The Othello*, 5 Blatch. 343.

The Government relies upon *The Fidelity*, 16 Blatch. 569, Fed. Cases No. 4758, as an authority for its con-

tention. All that the Fidelity decided was that a steam-tug owned by a municipal corporation, and used exclusively for extinguishing fires, was free from arrest.

It is well established that a municipality is only exempt from liability for torts of its officers when performing Governmental functions. This was the principle which Chief Justice Waite undoubtedly had in mind when he held that a fire boat so used in performing a Governmental function was not liable to arrest while being so used. Although he considers the distinction between liability and immunity, he apparently loses sight of the fundamental difference that exists. The only cases cited, in his opinion, are three decisions of New York State Courts:

> *Darlington* v. *Mayor*, 31 N. Y. 164;
> *Brinckerhoff* v. *Board of Education*, 2 Daly 443 (Reported on appeal as *Poillon* v. *Mayor*, 47 N. Y. 666); and
> *Leonard* v. *City of Brooklyn*, 71 N. Y. 498.

All that is held by these cases is that the property of a municipal corporation is not subject to seizure and sale on execution. All these cases rest upon the principle that, to permit a private suitor to attach property being used for a public purpose, would "seriously interfere with and impair the practical workings of the municipal government in the discharge of its legitimate functions" (71 N. Y. 500). These decisions are not inconsistent with the doctrine that a lien, although temporarily unenforcible, exists.

The Fidelity was disapproved in *Thompson* v. *City of Chicago*, 79 Federal, 984, and, so far as its dictum indicated a departure from the doctrine of The Siren and The Davis, was expressly disapproved by this court, speaking through Mr. Justice White, in *Workman* v. *City of New York*, 179 U. S. 552, 565.

In *The Ceylon Maru* (The Jeanette Skinner), 266 Fed. 396 (Dist. Ct. of Md.), a case exactly in point, Judge Rose refused to follow the dictum in The Fidelity. He so carefully analyzes the decision that we quote from his opinion at length.

> "On the 2nd of November, 1918, there was a collision between the American steamship Jeannette Skinner and the Japanese steamship Ceylon Maru. For brevity they will be called the Skinner and the Ceylon. The Skinner was then a Shipping Board ship, and still is. She was in charge of a naval crew, and for some months preceding the day named she had been in government service, engaged in transporting military supplies to the army in France. When she struck the Ceylon, she was homeward bound in ballast. Upon her arrival in this country she went into dry dock, and the Armistice having intervened, she was, on coming out, assigned to carry food products to Europe for account of the Swiss government. While so employed, she was arrested in this case.
>
> For reasons stated in an opinion heretofore filed (*The Jeannette Skinner* (D. C.), 258 Fed. 768), it was held that at the time she was seized by the marshal she was solely employed as a merchant vessel, and that under the authority of *The Lake Monroe*, 250 U. S. 246, 39 Sup. Ct. 460, 63 L. Ed. 962, she was not immune from ordinary process upon a libel *in rem* against her. The question was then reserved as to whether she could be held liable for a collision which occurred while she was owned by the Government and operated by its employes for its public military purposes.
>
> (1) On her behalf it is now argued that no liability *in rem* ever attaches to a ship belonging to the government for anything she does while in its public service. What Chief Justice Waite said, while on the circuit, in *The Fidelity*, 8 Fed. Cas. 1189, No. 4,758, fully sustains this contention. But the Supreme Court in *Workman* v. *New York City*, 179 U. S. 552, 21 Sup. Ct. 212, 45 L. Ed. 314, explained that what was decided

in that case was merely the application of the exception to the mode of execution of a judgment or decree against a municipal corporation, and then went on to say that in the admiralty law the existence of that exception in all cases had been denied, citing a case from this district. *Oyster Police Steamer of Md.* (D. C., 31 Fed. 763). It expressly declined to pass upon which of the conflicting conclusions on this point was the correct one. *The Siren* was cited (7 Wall. 153, 19 L. Ed. 129), and the English cases analyzed, and it was then declared that the English law, in harmony with the maritime law of this country, held that the fact that the wrong had been committed by a public vessel of the crown afforded no ground for contending that no liability arose because of the public nature of the ship, although it may be, in consequence of a want of jurisdiction over the sovereign, redress cannot be given. It said that the public nature of the service upon which the vessel was engaged at the time of the commission of a maritime tort affords no immunity from liability in a court of admiralty, when the court has jurisdiction. In *The Siren*, *supra*, the libel was *in rem*. The language of the Supreme Court is so clear that it does not seem that it is open to two constructions, and such clearly was the opinion of the Judges who sat in *The Florence H.* (D. C.), 248 Fed. 1012; *The Gloria*, 267 Fed. 929; *Samuelson* v. *The F. J. Luckenbach*, 267 Fed. 931 (both of the last mentioned cases having been decided in the Southern District of New York), and *The City of Philadelphia* (D. C.), 263 Fed. 234.

(2) On behalf of the Skinner the further contention is made that, were it not for Section 9 of the Shipping Act of 1916 (Comp. St. §8146e), it would not be possible to enforce any lien against her *in rem* while she remained, as she still is, government property. It is said that the immunity there waived is limited to causes of action which arose while she was employed as a merchant ship. It is argued that the principal reason why the section in question subjected government owned ships, while operated for mercantile

purposes, to the laws, regulations, and liabilities governing merchant vessels, was to protect privately owned craft from unfair competition. That is doubtless true, yet *The Siren, supra*, and *Workman* v. *New York City, supra*, hold that the liability was incurred when the tort was committed, even although the ship was then immune from arrest, and that but for such immunity it was enforceable against her. Now Section 9 expressly subjects government owned ships, when they are operated as merchantmen, to the laws governing merchant ships, and those laws, as interpreted in *The Lake Monroe, supra*, and other cases, include liability to admiralty process, so that, a maritime lien *in rem* existing, and the only objection to its enforcement having been government ownership, and the law having provided that that immunity shall no longer exist when the ship is used as a merchant vessel, it would seem to follow that she must now answer for a tort alleged to have been committed by her while engaged in army service."

* * * * * *

"While it is the duty of the Courts to see to it that the operations of the sovereign shall not be hampered by the seizure of its property, nor shall it, without its consent, be subject directly or indirectly, to suits, there is no reason why such legislation as that found in Section 9 of the Shipping Act of 1916 shall be narrowly construed. Such statutes are remedial, and are entitled to a fair liberality of interpretation."

The following cases are on all fours with the case at bar. Each of them was decided against the Government.

The U. S. S. Hisko, U. S. S. Roanoke and U. S. S. Pocahontas (Circuit Judge Manton, S. D. N. Y.) (March 17, 1921, unreported opinion annexed hereto);

The U. S. S. Newark (District Judge Knox, S. D. N. Y). (March 18, 1921, unreported opinion annexed hereto);

The U. S. S. Sixaola (District Judge Mayer, S. D. N. Y.) (April, 1921, unreported opinion annexed hereto);
The F. J. Luckenbach, 267 Federal, 931;
The Liberty, now before this Court;
The Carolinian, also now before this Court.

See also
The Florence H., 248 Fed. 1012;
The Gloria, 267 Fed. 929;
The City of Philadelphia, 263 Fed. 234.

All of these decisions recognize that *The Siren* and *The Davis* established the principle that a collision creates a lien against a public vessel, which may be enforced by process *in rem* whenever the Government vessel can be seized without ousting the actual possession of the Government. The Federal Judges before whom the question has come have been unanimous in sustaining jurisdiction. The Government has made in each case the same argument that it makes here, but it has been rejected in every instance.

Mr. Justice Story in *United States* v. *Wilder*, 3 Sumner, 308 held that goods owned by the United States were subject to a lien for a contribution in general average. During the course of his opinion, he said (page 312):

> "It is said that in cases where the United States are a party, no remedy by suit lies against them for the contribution, and, hence, the conclusion is deduced that there can be no remedy *in rem*. Now I confess that I should reason altogether from the same premises to the opposite conclusion. *The very circumstance that no suit would lie against the United States in its sovereign capacity would seem to furnish the strongest ground why the remedy in rem should be held to exist*" (italics ours).

The principle that the Maritime law extends to public vessels as well as to private vessels has been expressly recognized by Congress.

The Act of Congress of August 19th, 1890, adopting the International Rules to prevent collisions (Navigation Laws U. S. 1919, p. 355), provides as follows:

> "The following regulations for preventing collisions at sea shall be followed by all public and private vessels of the United States upon the high seas and in all waters connected therewith navigable by sea-going vessels."

Section 4233 of the Revised Statutes of the United States provides as follows:

> "The following rules for preventing collisions on the water shall be followed in the navigation of vessels of the Navy and of the Mercantile Marine of the United States."

No distinction between public and private vessels, nor between war vessels and merchant vessels, is made in these rules.

Moreover, where suits have been instituted by the Government for damages sustained by its public vessels from collisions, the liability of the vessels involved, including the public vessels, has been determined in every case by the Maritime law. *The Esparta*, 160 Federal 269; *The A. A. Raven*, 231 Federal, page 380 (C. C. A., 3rd Circuit). In the last mentioned case, the court held both vessels to blame. The case was then referred to a Commissioner to assess the damages, and he assessed the damages to both the A. A. Raven, a privately owned vessel, and the Delaware, the Government vessel. In the final decree on mandate, a balance was struck between the two, and, as the balance was in favor of the privately owned vessel, no recovery was allowed to the United States. It thus appears that the liability was

determined under the principle of *The North Star,* 106 U. S. 17.

Recently a case came before the English court, where a libel was filed by the Lords Commissioners of the Admiralty, representing the British Government as owner of a warship, against a privately owned vessel, to recover damages suffered by the warship from collision. The court, without requiring a petition of right, held the warship solely to blame. *Admiralty* v. *S. S. Eleanor,* VI Lloyd's List Law Reports, 456, March 11th, 1921.

It is to be observed that, when the Government waives its immunity, all that is done is to waive immunity from suit. It cannot be said that the liability arises from the act of the Government in waiving its immunity from suit. The liability existed before the suit was brought, otherwise there could be no cause of action on which to base the suit.

As was said by this Court in *United States* v. *Ringgold,* 8 Peters 162:

> "No direct suit can be maintained against the United States; but when an action is brought by the United States, to recover money in the hands of a party, who has a legal claim against them, it would be a very rigid principle, to deny him the right of setting up such claim in a court of justice, and turn him round to an application to Congress. *If the right of the party is fixed by the existing law,* there can be no necessity for an application to Congress, except for the purpose of remedy. And no such necessity can exist, when this right can properly be set up by way of defence to a suit by the United States." (Italics ours.)

Mr. Justice Miller, in *United States* v. *Lee,* 106 U. S. 196, 206, said:

> "As no person in this Government exercises supreme executive power or performs the public

> duties of a sovereign, it is difficult to see on what solid foundation of principle the exemption from liability to suit rests."

Mr. Lord, in the article to which we have already referred, discusses this matter at length (Columbia Law Review, Volume 19).

When the Suits in Admiralty Act was before the Committee, Ira A. Campbell, Admiralty Counsel for the Shipping Board and the Special Assistant in Admiralty to the Attorney General, said:

> "The Supreme Court has held, I think, in the case of *The Siren*, that while you cannot libel a vessel in the possession of the United States for a maritime lien, nevertheless a maritime lien does arise from a maritime casualty, we will say, while the possession is in the United States, but is unenforcible." (Hearings Senate Committee on Commerce, 66th Congress, 1st Session, on S. 2253, p. 18.)

The Government, in its brief, cites the case of *Kawananakoa* v. *Polybank*, 205 U. S. 349, 353, which was not a suit in Admiralty and in which the facts appear to be wholly different from those in this case. If any expression in that opinion should be regarded as tending against our position, it would not only be in conflict with *The Siren* and *The Davis*, but also with *United States* v. *Ringgold*. Obviously the learned justice who wrote the opinion in that case did not have in mind such a situation as that with which we are now dealing. The fact that none of the decisions just cited was even mentioned in the opinion shows that it was not intended to modify the doctrine which they establish.

Counsel for the Government are unduly perturbed as to the possibility that the decision in this case may impair the archaic notion of sovereignty. Mr. Felix Adler

in his "Ethical Philosophy of Life" (1918) at pages 308-309, discusses the modern views regarding sovereignty. He says:

> "Because of the lack of an ethical point of view, the exercise of force by the state has seemed purely arbitrary and has given rise to a perverted and disastrous conception of sovereignty. The sovereignty of the state has two aspects: The one internal, the other external. Sovereignty means supremacy. The state is sovereign, within limits however, with respect to its citizens. The state is also sovereign, within limits however, with respect to outside states.
>
> With reference to the internal aspect of sovereignty some writers hold that *citizens have no rights as against the state*—only rights accorded by the state. But *this, from the ethical point of view, is a wholly untenable position.* There are rights of the individual, rights of the family, rights of the vocational group which the state does not create but is bound to acknowledge and which its power cannot properly infringe * * *. The absolute conception of sovereignty is the result of the lack of an ethical conception of the social institutions. The state is sovereign only so far as the exercise of its supremacy is necessary to the spiritual end of citizenship * * *. The false notion of state sovereignty as arbitrary and absolute is admittedly today a chief stumbling block in the way of the formation of an international organization of peoples."

And on page 185 it is said:

> "Orthodox jurisprudence like orthodox religion is characterized by the absoluteness of its formula. It ignores the existence of conflicts in the long line of antecedent historical development and it disdains to entertain the demand for modification, though the circumstances of the time loudly call for it * * *. Orthodox jurisprudence effaces the end and treats that which is or has been at one time a means as if it possessed a sanctity of its own."

We annex an opinion recently delivered by Circuit Judge Mack, in *The Pesaro,* which contains an interesting discussion of the modern tendency to restrict a sovereign's immunity. These observations apply with peculiar force to the case which the court has now under consideration. Here a Government vessel rammed and damaged a vessel at anchor. The Government has never suggested that there was a defense on the merits.

Counsel for the Government argue that, if our theory of the law is correct, private ship owners, whose vessels have been damaged, will become part owners of Government vessels at fault. A maritime lien does not entitle the holder thereof to possession or to interfere with the operation of a public vessel. The evil results conjectured by the counsel for the Government are purely imaginary. Whatever inconvenience might have resulted from the arrest of a ship, after being returned to private ownership, is obviated by the Suits in Admiralty Act of March 9th, 1920.

CONCLUSION.

We have shown that:

I. The Government concedes that the Western Maid, at the time of her arrest was subject to suit.

II. The Western Maid was a merchant vessel at the time of the collision.

III. Congress, by the Act of March 9th, 1920, has waived immunity as to merchant vessels, and the effect of Section 3 of this Act is to make this cause a suit under that Act.

IV. If, however, we assume that the Western Maid was a public vessel at the time of the collision, a claim in favor of the libellant was created against her at that

time. Although the claim could not then be enforced, it existed, and, when the vessel became generally subject to suit, could be enforced by suit *in rem*.

It is respectfully submitted that the petition for writs of prohibition and mandamus should be denied.

December, 1921.

T. CATESBY JONES,
Counsel for the Honorable
J. Whitaker Thompson, Respondent.

T. CATESBY JONES,
JAMES W. RYAN,
Of Counsel.

Appendix A.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK.

STANDARD OIL COMPANY OF NEW JERSEY

—against—

The Steamboat NEWARK, her Engines, etc., Claimant.

KIRLIN, WOOLSEY, CAMPBELL, HICKOX & KEATING (L. de Grove Potter of Counsel) for libellant;

FRANCIS G. CAFFEY (James W. Ryan of Counsel) for Claimant.

KNOX, D. J.: While it is true that the Newark, at the time of the commission of the tort alleged against her, was in the possession and control of the United States, and manned and officered by the Navy Department, she is not, now that she has been returned to private ownership, immune from liability for the tort of which she is said to be guilty.

A very similar, if not the precise, point here involved was before the Court in *The Gloria*, 267 Fed. 929. Judge Learned Hand there held that a lien might accrue against a ship at a time when she was a part of the United States Navy and solely engaged in the transportation of troops and further, that such lien would survive the transfer of the vessel's possession by the United States. To the same effect in this district is the case of *The F. J. Luckenbach*, 267 Fed. 931, wherein Judge Mack followed the ruling of Judge Hand.

Subsequent to the above mentioned decisions the case of *The Jeanette Skinner,* 266 Fed. 396, came before Judge Rose of the District of Maryland, and he ruled to the same general effect. The judges who sat in the above cases apparently had no doubt that the position assumed by them was supported by *The Siren,* 7 Wall. 152, and so it seems to me. I am not unmindful of what was said by Chief Justice Waite, while on circut, in the *Fidelity,* 8 Fed. Cases 1189, No. 4,758; but the sweeping effect of what was there said was, it would seem, very much limited by the Supreme Court in its decisions in *Workmen* v. *New York City,* 179 U. S. 552.

At all events, two judges sitting in this district have resolved the question adversely to the contention of the Government. That fact standing alone would be quite sufficient to warrant a similar ruling upon my part even if I were inclined to disagree with the conclusions of my colleagues. I believe, however, that *The Gloria* and *The F. J. Luckenbach* were rightly decided and I shall follow them. In addition to the foregoing decisions in this district, I understand that in the case of *Eagle Oil Transport Ltd.* v. *United States of America an Owner of the U. S. S. Pocahontas, et al.,* Judge Manton, sitting in the District Court, handed down on March 16, 1921, a decision in which he holds to this same effect.

Libelant's exceptions to the suggestion of the United States Attorney will be sustained.

March 17, 1921.

JNO. C. KNOX,
U. S. District Judge.

Appendix B.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

EAGLE OIL TRANSPORT COMPANY, LTD., as owner of the British SS San Tirso,

—against—

UNITED STATES OF AMERICA, as owner of the U. S. SS Pocahontas.

ADMIRANTE STEAMSHIP CORPORATION, as owner of SS Almirante,

—against—

UNITED STATES OF AMERICA, as owner of SS Hisko.

A. A. WIRE COMPANY, INC., as owner of cargo on board the SS Almirante,

—against—

UNITED STATES OF AMERICA, as owner of SS Hisko.

MARCELINO E. CONLE, trading under the firm name of Marcelino E. Conle & Co., as owner of cargo on board the SS Almirante

—against—

UNITED STATES OF AMERICA, as owner of SS Hisko.

WM. LITZRODT, trading under the firm name and style of Broedermann & Litzrodt, as owner of cargo on board the SS Almirante

—against—

UNITED STATES OF AMERICA, as owner of SS Hisko.

HAIN STEAMSHIP COMPANY, LTD., as owner of the British Steamship Trevanion,

—against—

SS EL DIA (formerly known as U. S. SS Roanoke).

HARRINGTON, BIGHAM & ENGLAR, Proctors for A. A. Wire Co., Inc.

KIRLIN, WOOLSEY, CAMPBELL, HICKOX & KEATING, Proctors for: Almirante S. S. Corporation, Hain Steamship Co., Ltd., Eagle Oil Transport Corp.

FRANCIS G. CAFFEY, United States Attorney; JAMES W. RYAN, Asst. U. S. Attorney.

In each of the above cases the United States has filed a suggestion. This is a motion whereby it is prayed that the court quash process issued herein and dismiss the libel with costs on the ground that the court is without jurisdiction. The claim is that each vessel is not subject to the jurisdiction of the court because of the rule as to immunity from suit of a sovereign. It is said because the subject matter is not within the jurisdiction of the court, a suit *in rem* cannot be maintained because a maritime lien does not exist against a public vessel. The cause of suit arose while the vessels were in public service and then were immune from process. In well considered cases in the district court since, it has been held that a collision or breach of obligation created a lien, but that the lien was unenforceable while the vessel remained in the Government's possession. That when such a vessel ceased to be in the Government's possession, the lien against it is enforceable and process may be issued. *The Jeannette Skinner*, 266 Fed. 396 (Judge Rose); *The Gloria*, 267 Fed. 931 (Judge Mack). The

immunity which attaches to a public vessel merely prevents the enforcement of the lien which is created in favor of a libellant if his claim be good.

This rule may seem harsh as against a new owner, but the language of Justice Brown in *Tucker* v. *Alexandroff* (183 U. S. 424) is pertinent:

> "A ship is born when she is launched, and lives so long as her identity is preserved. Prior to her launching she is a mere congeries of wood and iron—an ordinary piece of personal property—as distinctly a land structure as a house, and subject only to mechanics' liens created by state law and enforcible in the state courts. In the baptism of launching she receives her name, and from the moment her keel touches the water she is transformed, and becomes a subject of admiralty jurisdiction. She acquires a personality of her own; becomes competent to contract, and is individually liable for her obligations, upon which she may sue in the name of her owner, and be sued in her own name. Her owner's agents may not be her agents, and her agents may not be her owner's agents. * * * She is capable, too, of committing a tort, and is responsible in damages therefor. She may also become a quasi bankrupt; may be sold for the payment of her debts, and thereby receive a complete discharge from all prior liens, with liberty to begin a new life, contract further obligations, and perhaps be subjected to a second sale" (p. 438).

The new owner must take the vessel subject to whatever lien exists against her and he must therefore make inquiry as to the past of the ship and the liens thereon.

The objections to the jurisdiction of the court are overruled.

(Signed) MANTON,
U. S. C. J.

March 16, 1921.

Appendix C.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JOSEPH CARUBA, as owner, etc.,

Libellant,

—against—

STEAMSHIP SIXAOLA.

(Note: This was a libel against a privately-owned vessel which at the time the liability sued on arose was an Army cargo transport, manned by a Naval crew, and loaded with Quartermaster's and Engineer Corps' supplies destined for the American Expeditionary Forces.)

MEMORANDUM.

The question of jurisdiction here involved has been the subject matter of consideration by this court and has been decided adversely to the contention of the Government.

The F. J. Luckenbach, 267 F. R. 931, per Mack, C. J., sitting in this District;
The Standard Oil Company of New Jersey v. *The Steamboat Newark*, decided March 17, 1921, per Knox, D. J.

See also

The Ceylon Maru, The Jeenette Skinner, 266 F. R. 396.

It is the settled practice in this District that the decision of a brother judge will be followed, unless, perhaps, there is some unusual circumstance or some fact or authority has not been called to his attention or unless the decision seems to be clearly erroneous.

The question here under consideration is arguable, but I agree with the principles laid down in the decisions of Judges Mack, Knox and Rose.

The next question is whether the sinking of the Sixaola which caused her to block the slip and to restrict the movements of vessels caught in the slip, if caused by negligence in her operation was a maritime tort and imposed a maritime lien upon the S. S. Sixaola for all damages caused to the owners of the vessels confined in the slip. I have examined the authorities submitted and carefully briefed by the proctors for both sides, and it seems to me that the position taken by libellant is sound. I am of opinion that it is not material whether or not there has been an actual collision. The question is by no means free from doubt and, if I am in error, the point will be preserved upon appeal, should libellant succeed in obtaining a decree.

April 21, 1921.

J. M. MAYER,
District Judge.

Appendix D.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK

LUZZATO & SONS,

Libellant.

—against—

S. S. "PESARO."

BERIZZI BROTHERS COMPANY,

Libellant,

—against—

S. S. "PESARO."

KIRLIN, WOOLSEY, CAMPBELL, HICKOX & KEATING,
Proctors for Special Claimant.

HARRINGTON, BIGHAM & ENGLAR,
Proctors for Libellants.

MEMORANDUM OPINION.

MACK, *Circuit Judge*:

Libel *in rem* against the steamship *Pesaro* to enforce a claim for damage to a cargo of olive oil shipped thereon. Previously, when the ship was libelled to enforce the same claim, upon the direct suggestion by the Italian Ambassador that the ship was owned by the Italian Government and at the time of the arrest was in its possession and therefore was not subject to arrest, this Court vacated the arrest. Upon appeal, the Supreme Court upheld the libellant's objection that this suggestion must come through the official channels of the United States. The Court added that it had no occasion at that time to consider what the decree should

have been if the matters affirmed in the suggestion had been brought to the Court's attention and established in an appropriate way. *The Pesaro*, 255 U. S. , decided February 28, 1921.

By stipulation, the parties have agreed that the question of jurisdiction shall be decided upon the basis of the following facts: First: That the steamship *Pesaro* was owned by the Kingdom of Italy, registered in the name of Ministry for Railway and Maritime Transportation, a department of the Royal Italian Government charged with affairs of maritime and rail transportation, which has as its head a member of the Italian Cabinet. Second: That the steamship was in the possession of the Italian Government, being manned by a Master, officers and crew employed by and under the direction of the Ministry for Railway and Maritime Transportation and paid by it. Such master, officers and crew were civilians not under the orders of or connected with the Italian naval or military forces, and the vessel was not carried on the roster of the Italian Navy as a naval vessel. Third: That the steamship *Pesaro* was engaged in commercial trade carrying passengers and goods for hire, and in such trade was not functioning in a naval or military capacity, or under the immediate direction of the Department of the Italian Government having to do with naval and military affairs. Fourth: That the letter (the substance of which, so far as necessary, is given in a note below, *a*) of Advocatto Francisco Montefredini, dated June 21, 1920, may be read by either party on the trial of the issues raised by the libel and

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a "1. Question. Is a ship owned by the United States and operated for the United States as a merchant vessel by a private steamship company immune from arrest in the Italian Courts on a claim for damage to cargo or any other claim to which a private ship is ordinarily subject to arrest in the Italian Courts?

Answer. No. Such steamers, notwithstanding they may be owned by the U. S. Government are considered in Italy just the same as a privately owned merchant vessel, and are, therefore, subject to arrest, but always on the authority of the President of the Tribunal.

* * * * * * * * * * *

The U. S. S. B. steamers are subject to arrest, as above, only because they are merchant vessels, as according to the Italian law

the special claim and plea in abatement as the evidence of Francisco Montefredini with the same force and effect as if he had testified in accordance with the said letter; subject, however, to objection by either party to the case as to the materiality, relevancy or competency of the matters referred to in the said letter, or any of them.

The Supreme Court has recently intimated that it considered the question whether the ship of a foreign government used and operated by it as a merchant vessel, is, when within the waters of the United States, immune from arrest in admiralty, as "important and also new" and that the "proper solution is not plain but debatable." *In re Hussein Lufti Bey*, decided June 6, 1921. *In Re Muir*, 255 U. S. , decided January 17, 1921. For that reason a re-examination of this question would seem to be justified, if not required, notwithstanding the decision in this Court in *The Maipo*, 252 Fed., 627; 259 Fed., 367, and the views expressed by the Circuit Court of Appeals in the *Carlo Poma*, 259 Fed., 369, especially as the decree in the latter case was vacated by the Supreme Court for want of jurisdiction in the Court of Appeals, decided February 28, 1921.

The general principle of the immunity of a sovereign state from suit without its express consent is too deeply imbedded in our law to be uprooted by judicial decision. See *Ex parte, In the Matter of the State of New York, Edward S. Walsh, Superintendent*, U. S. Sup. Ct., June

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there is no difference between a vessel owned by a foreign Government or by a private company, provided it is engaged in commercial operations. Only men of war are immune from arrest for claims.

* * * * * * * * * * *

4. Question. Is the ship owned by the Italian Government operated as a merchant vessel by the Italian Government free from arrest in ordinary, judicial process in the Italian Courts?

Answer. During the war all Italian steamers were requisitioned, but notwithstanding were subject to arrest.

This was simply a legal point, and the steamer was immediately released as the Government guaranteed any possible sentence, withholding from the charter money until settlement of case a sufficient amount to cover any claim.

Now this procedure will be discontinued and all merchant vessels, whether Government-owned or privately owned, will be subject to arrest."

1, 1921. While the principle has been fervently defended by some jurists as vital and fundamental to sovereignty (see dissenting opinion of Justice Gray in *U. S.* v *Lee*, 106 U. S., 196), the extent to which it has been carried or retained in modern law has been the subject of strong criticism (*Story, J.* in *U. S.* v. *Wilder*, 3 Sumner, 308; *Laski, The Responsibility of the State in England*, 32 Harvard Law Review, 447; *Maguire, State Liability for Tort*, 30 Harvard Law Review, 20; cf. *Lord, Admiralty Claims Against the Government*, 19 Col. L. R., 467; *Weston, Actions Against the Property of Sovereigns*, 32 Harvard Law Review, 266), and there is observable a tendency to restrict its application or to guard against its *extension* (*U. S.* v. *Lee, supra; cf. South Carolina* v. *U. S.*, 199 U. S., 437).

Where the application of the doctrine is not clear, a solution is not to be found by reference to strict Austinian theory which assumes, by mere definition, that the sovereign is not subject to his own laws. Nor is it to be found by uncritical reference to historical origins. The reasons which in the past led to the exemption of the sovereign from suit may or may not justify the extension of the principle in modern law. In dealing with admiralty causes, historical or theoretical conceptions peculiar to the common law, must not be assumed to be a part of the maritime law of nations.

In attempting to solve a confessedly new and unsettled problem, the Court, while conforming its decision to certain norms or standards evolved from within the legal system, should not determine the application of these standards solely by logic. It may have to choose between competing judicial analogies and parallel trends of juristic thought; its conclusions should, if possible, conform to the practical ends of the law in a moving, working world.

So in dealing with an unsettled problem in the application of sovereign immunity, the Court must not only consider history and logic; it must also look behind and

beyond both and inquire whether the public interests justify or require an extension of sovereign exemption from the usual processes of judicial justice. With the growth and development of state activity, it behooves the Court to consider the consequences which would flow from a ruling removing from the ordinary judicial administration matters of vital importance to the community, which have for centuries been handled through the regular judicial processes.

The question of the exemption from attachment of a ship of a friendly sovereign first arose in our Courts in the case of *The Exchange,* 7 Cranch., 117. It concerned a public foreign ship of war. Bynkershoek had stirred the question whether any ship was immune from seizure, having laid it down as a general proposition that the property of a foreign sovereign was not exempt from attachment (*De Foro Legatorum,* Ch. IV.). Marshall, C. J., pointed out that "the jurisdiction of the nation within its own territory was necessarily exclusive and absolute and susceptible of no limitation not imposed by itself. * * * All exceptions to the full and complete power of a nation, within its own territories, must be traced up to the consent of the nation itself. * * * This consent may, in some instances, be tested by common usage and by common opinion growing out of that usage. * * * One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him." Marshall consequently concluded as a principle of public law that ships of war entering the port of a friendly power, open to their reception, are to be considered by the consent of that power as exempt from its jurisdiction.

While the Court had no occasion to consider the case of a public ship used for trading purposes, Marshall (p. 145), pointed out "a manifest distinction between the private property of the person who happens to be a prince and the military force which supports the sovereign power and maintains the dignity and independence of a nation. A prince by acquiring private property in a foreign country may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince and assuming the character of a private individual; but this he cannot be presumed to do with respect to any portion of that armed force, which upholds his crown, and the nation he is entrusted to govern."

While Marshall was probably referring to the private property of a prince as a private person, it is interesting to note the similarity of his language to that employed by him in the case of a state engaging in a commercial undertaking. In the Bank of *U. S.* v. *Planters' Bank of Georgia*, 9 Wheaton, 904, he said: "It is, we think, a sound principle that when a government becomes a partne rin any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character and takes that of a private citizen. Instead of communicating to the company its privileges and prerogatives, it descends to a level with those with whom it associates and to the business which is to be transacted." *b.* See also *Bank of Kentucky* v. *Wister*, 2 Peter, 318; *Briscoe* v. *Bank of Kentucky*, 11 Peter, 256, 323; *Louisville R. R.* v. *Letson*, 2 How. 497, 550; *Curran*

b Compare the remarks of Lord Stowell in The Swift, 1 Dodo, 320, 339: "The utmost that I can venture to admit is that, if the King traded, as some sovereigns do, he might fall within the operation of these statutes. Some sovereigns have a monopoly of certain commodities, in which they traffick; and, if the King of England so possessed and so exercised any monopoly, I am not prepared to say that he must not conform his traffick to the general rules by which all trade is regulated. But the present question is—is this distribution of the public stores for the public use, a trading within the view of the statute. Looking to authority, as well as principle, and to the public convenience, I conceive, it is not."

v. *Ark*, 15 How., 304, 308; *Panama R. R.* v. *Curran*, 256 Fed., 772; *Lord & Burnham* v. *U. S. S. B., E. F. C.*, 265 Fed., 955, 957.

In *U. S.* v. *Wilder*, 3 Sumner, 308, 315-317, Mr. Justice Story apparently was of the opinion that a government-owned merchant vessel might not be entitled to the same privileges and immunities as a ship of war. He said:

> "A distinction was taken in that case (The Prins Frederik, 2 Dod., R. 451), which, indeed, has been often taken by writers on public law, as to the exemption of certain things from all private claims; as, for example, things devoted to sacred, religious and public purposes; things *extra commercium et quorum non est commercium*. That distinction might well apply to property like public ships of war, held by the sovereign *jure coronæ*, and not to be applicable to common property of the sovereign of a commercial character or engaged in the common business of commerce.
> * * *
>
> In the case of *The Schooner Exchange* (7 Cranch, R. 116), it was considered by the Court that the ground of exemption of the ships of war of a foreign sovereign coming into our ports, from all process, was founded upon the implied assent of our government. But it was not decided that the other property of a foreign sovereign, not belonging to his military or navy establishment, was entitled to a similar exemption. Bynkershoek seems, indeed, in his bold and uncompromising manner to have held all the property of a foreign sovereign, including his ships of war, to be liable, in the courts of another sovereign, where they are found, to be attached for his debts. His own government, in a case of that sort, released the property. Bynkershoek has the support of other jurists in favor of his opinion at least to the extent of their common private property, found in the foreign territory. But it is not necessary to consider this point further, as there may be a clear

distinction between the case of a foreign sovereign and that of a domestic sovereign in this particular.

It has been laid down by Vattel (B. 2, S. 213) that the promises, the conventions, and all the private obligations of the sovereign, are naturally subject to the same rules, as those of private persons. And this, as a general rule, has been adopted in the interpretation of contracts, to which our government is a party, by the Supreme Court of the U. S., in the case of *U. S.* v. *Barker*, 12 Wheaton R. 559. Vattel has added in the same place: 'If there exists any difficulty on this account, it it equally conformable to prudence, to the delicacy of sentiment which ought to be conspicuous in a sovereign, and to the love of justice, to cause them to be decided by the tribunals of the state. This is the practice of the states that are civilized and governed by laws.' (Vattel, B. 2, S. 213.) I fear that this republic cannot justly claim the praise of carrying into effect this deep and solid principle of justice; and the several states of the Union, with very few exceptions, have insisted on the same immunity. But I do not rely upon the language of Vattel to show that it is the duty of the sovereign to fulfil all his obligations, whether founded in contract or implied by the general principles of law; and that sovereignty does not necessarily imply an exemption of its property from the process and jurisdiction of courts of justice."

U. S. v. *Wilder*, it is true, is not a direct authority for the proposition here in question. The decision in that case was simply to the effect that government-owned cargoes not in the possession of the government could be withheld by virtue of a maritime lien arising from the obligation of the cargo to contribute in general average. In *The Davis*, 10 Wall, 15, the Supreme Court went a step further and held that such cargoes could not only be retained without judicial process by the ship owner but could be libeled in admiralty by salvors seeking to enforce their lien against ship and cargo. See to the same effect *Johnson Lighterage Co.*, 231 Fed., 365.

But cf. *The Fidelity*, 16 Blatchf., 569; 8 Fed. Cases, 4758. Similarly, in *Long* v. *Tampico*, 16 Fed. 491, revenue cutters belonging to the Mexican Government but not yet delivered into her possession were held subject to libel for salvage services. On the same principle, a requisitioned vessel manned and operated for the Italian Government by her owners was held subject to attachment in *The Attualita*, 238 Fed., 909.

On the other hand, in *Briggs* v. *The Light Boats*, 11 Allen, 157, in an able and exhaustive opinion which has frequently been referred to by the Supreme Court, Judge Gray held that immunity of public ships was not restricted to ships of war; that "the exemption of a public ship of war of a foreign government from the jurisdiction of our courts depends rather upon its public than upon its military character"; that, in consequence, lightships belonging to and in the possession of the United States could not be attached to secure the enforcement of a mechanic's lien. It should be remembered, however, that the case did not arise in admiralty and the actual decision does not go beyond that of the Supreme Court in *Ex parte. In the Matter of the State of New York, et al., owners of the steam tug Queen City*, decided June 1, 1921, in which the question of the immunity of a public trading vessel from a libel *in rem* was expressly reserved. In *Mason* v. *Intercolonial Railway*, 197 Mass., 349, the Massachusetts Court, relying upon *Briggs* v. *The Light Boats, supra*, held that funds belonging to the Canadian State Railway were not subject to attachment under state law by trustee process.

The English courts grant exemption to a merchant vessel owned and operated by a sovereign state even in admiralty. Sir Robert Phillimore, in the *Charkieh*, L. R. 4, A. and E., 59, and in the *Parlement Belge*, 4 Probate Div., 129, after a careful examination of the authorities and a comparison of the civil law on the subject, came to the conclusion that the exemption of a

public ship from seizure did not extend to a vessel engaged in commerce, whose owner was (to use the expression of Bynkershoek) *strenue mercatorem agens.* But, in the latter case, on appeal (5 Prob. Div., 197), Sir Robert's opinion was not sustained. The Court of Appeals found that the carrying of passengers and merchandise had been subordinated to the duty of carrying the mails and that the mere fact that the *Parlement Belge* had been subordinately and partially used for trading purposes did not take away its general immunity, even if an action *in rem* were deemed to be a proceeding solely against the property, and not a procedure directly or indirectly impleading the owner of the property to answer the judgment of the Court. It was careful, however, to point out that in its opinion the owner was indirectly impleaded. Taking this dictum as a starting point, the English admiralty courts by successive decisions have come to recognize that all government-owned ships, whether used for military, political or commercial purposes, are in time of peace, as well as of war, immune from seizure. *Young* v. *Scotia,* 1903 A. C., 501 (Ferryboat used as part of Canadian state railways); *The Jassy,* 1906 Prob. Div., 270 (Merchant vessel used as part of Roumanian state railways); *The Broadmayne,* 1916 Prob. Div., 64 (requisitioned vessel operated in government service by private owner); *The Gagara,* 1919 Prob. Div., 96; *Porto Alexandre,* 1920 Prob. Div., 30 (Merchant vessels owned and operated by friendly sovereign states).

The basis of these decisions is almost exclusively the authority of the *Parlement Belge, supra.* In *Porto Alexandre,* the great difficulties involved in granting an immunity so extensive were pressed upon the Court; but it felt bound by authority. Lord Justice Scrutton expressed the view that these practical difficulties must "be dealt with by negotiations between governments and not by governments exercising their power to interfere with the property of other states contrary to the prin-

ciples of international courtesy which govern the relations between independent sovereign states."

The question, however, is whether international courtesy does or does not require this immunity to friendly foreign states, particularly if the immunity does not exist in favor of the sovereign's own similar interests in his own courts. Certainly there appears to be no consensus of opinion among international jurists to this effect. See *Wheaton International Law*, edited by Coleman Philipson (1916), p. 161; also 12 *Revue Generale de Droit International Public* (1905), p. 143. While the French Court of Appeal at Rennes held a merchantman owned by the British Government carrying wheat and wool for the Allied Governments immune from seizure, it took occasion to point out that the vessel was being utilized "with an object of political interest for the need of national defense, apart from all idea of gain and speculation." More recent decisions of inferior French tribunals, following the English precedents in declining jurisdiction over public vessels employed in commercial service, have been adversely criticised. *Journal de la Marine Merchande*, February 3, 1921.

From the evidence before me it would appear that the Italian Courts refuse to grant immunity in such cases. In Section 9 of the Shipping Act, Congress expressly declared that vessels purchased from the Shipping Board, while employed solely as merchant vessels, shall be subzject to the laws, regulations and liabilities governing merchant vessels; and even during the war emergency, this section was broadly construed by the Supreme Court. *The Lake Monroe*, 250 U. S., 246. Since then, the method of enforcing the liability of our public merchant vessels has been changed by the Suits in Admiralty Act so that the ships cannot and need not be arrested or detained, but the nature of their liability remains unchanged and is unenforceable in the courts. Certainly then the exercise of jurisdiction by the courts in the case of public merchantmen cannot today be con-

sidered novel or revolutionary. The executive branch of our government, it may be assumed, will not be slow to bring to the attention of the judiciary any appropriate suggestion any matter of international courtesy or concern. The failure of our State Department to take any action in these cases is not without significance, c (*Hearings before Committee on Judiciary in H. R. 7124, Suits in Admiralty Act*, 66th Congress, 1st Session, August 26, 1919, p. 38), although I do not mean to say that immunity should be refused in a clear case simply because the executive branch had failed to act.

The English decisions above mentioned seem to proceed on the principle that a ship cannot be libelled *in rem* where the owner cannot under the common law be impleaded *in personam*. This doctrine, so far as effective, would appear to be peculiar to English admiralty and is not accepted as a part of the maritime law in this and other countries. As Justice Gray stated in *Homer Ramsdell Co.* v. *Com. Gen. Trans.*, 182 U. S., 406, 413, a case involving the liability of a ship for the negligence of a compulsory pilot: "There is no occasion to refer further to the English cases in admiralty, because in England, it is held that the ship is not responsible in admiralty, where the owner would not be at common law, differing in this respect from our own decisions. *The China*, 7 Wall, 53; *Ralli* v. *Troop* (1894), 157 U. S., 386, 402, 420; *The John G. Stevens* (1898), 170 U. S., 113, 120-122; *The Barnstable* (1901), 181 U. S., 464." See *The Maria*, 1 W. Rob, 95, 106, *The Halley*, L. R. 2 P. C., 193, 201. Lord Sto-

c In answer to my inquiry, the Secretary of State, through the Solicitor for the State Department, stated on August 2, 1921:

"It is the view of the Department that government-owned merchant vessels or vessels under requisition of governments whose flag they fly employed in commerce should not be regarded as entitled to the immunities accorded public vessels of war. The Department has not claimed immunity for American vessels of this character. In cases of private litigation in American ports involving merchant vessels owned by foreign governments, the Department has made it a practice carefully to refrain from taking any action which might constitute an interference by the authorities of this Government in such litigation."

well, in *Neptune II*, 1 Dod. 467, had earlier laid down the rule as to the ship's responsibility for the acts of its pilots in accordance with the general maritime law. And it is perhaps no mere accident that Sir Robert Phillimore, whose views on the maritime law were rejected by the common law judges sitting in the Court of Appeals in the case of the *Parlement Belge, supra*, happened to differ from the Privy Council in the case of *The Halley*, L. R. 2 Ad. & Ec. 3.

It is also important to note that in the *Siren*, 7 Wall, 152, the Supreme Court recognized that a ship in the possession of the government might be held to respond in damages for the negligence of its officers resulting in a collision where the government brought the ship into court to be adjudicated as a prize. It would seem that even the English Courts have gone so far as to apply the doctrine of *respondent superior* to a public ship in admiralty where the government consents to the suit. *The Athol*, 1 W. Rob., 374, 382. The procedural bar removed, it would appear that even a tort liability may in some instances at least be imposed upon a ship owned and operated by the government, notwithstanding the fact that the government could not, on common law principles, be impleaded in the court of claims on the basis of such a complaint (cf. also *Workman* v. *N. Y.*, 179 U. S. 570). In this connection, the words of Judge Story in *U. S.* v. *Wilder*, 3 Sumner, 308, 312, are important: "It is said that in cases where the United States are a party, no remedy by suit lies against them for contribution; and hence the conclusion is deduced that there can be no remedy *in rem*. Now, I confess, that I should reason altogether from the same premises to the opposite conclusion. The very circumstance that no suit would lie against the United States, in its sovereign capacity, would seem to furnish the strongest ground, why the remedy *in rem* should be held to exist."

Whatever may be the common law or the civil law on the subject, and it is not necessary to go into that

question here, it should be remembered that the responsibility of a ship in admiralty is not derived from either. It had its sources, as has been frequently pointed out, in the commercial usages and jurisprudence of the middle ages, and earlier. Originally, the primary liability was upon the vessel; that of the owner was not personal but incidental to her ownership; from this, he was discharged either by the loss of the vessel or by abandoning her to creditors. *The China*, 7 Wall, 53, 68; *The Barnstable*, 181 U. S., 464, 467. If, as I believe, sound principles of admiralty jurisprudence require that a ship be treated as an entity separate and distinct from her owner, the immunity of a public ship should depend primarily not upon her ownership but upon the nature of the service in which she is engaged and the purpose for which she is employed. That is a distinction or standard towards which Bynkershoek, Marshall and Stowell tended and in favor of which there is not only the specific authority of Story and Phillimore but the force of judicial analogy and the requirements of modern economic life.

If the *Pesaro* is not immune from seizure by reason of her government ownership, it would seem clear that she could not claim exemption from attachment on account of the merchant service in which she was engaged. While in *The Davis*, 10 Wall. 15; *Long* v. *Tampico*, 16 Fed., 491, and *The Attualita*, 238 Fed., 909, the lack of possession by the government was stressed as of vital importance, in my judgment, such possession is not the exclusive criterion. Since, apart from the question of possible immunity by reason of government ownership, it is generally recognized that without treaty provisions, merchant ships are not exempt from seizure by reason of their employment in the postal service (*Bonfils, Manuel de droit International*, 7th Ed., 1914, Sec. 629), immunity should not be given vessels owned and employed by the government in ordinary times in the usual channels of trade. To deprive parties injured in the

ordinary course of tarde of their common and well established legal remedies would not only work great hardship on them, but in the long run it would operate to the disadvantage and detriment of those in whose favor the immunity might be granted. Shippers would hesitate to trade with government ships, and salvors would run few risks to save the property of friendly sovereigns, if they were denied recourse to our own courts and left to prosecute their claims in foreign tribunals in distant lands. See *Hearings before Committee on Judiciary on H. R.* 7124 (Suits in Admiralty Act), 66th Congress, 1st Session, August 26, 1919, pp. 32 and 45. The attachment of public trading vessels, in my judgment, is not incompatible with the public interests of any nation or with the respect and deference due a foreign power.

In many phases of our law today it becomes necessary to distinguish between those cases in which it is, and those cases in which it is not, consistent with the public needs and interests to subject the state, its agencies and properties to the ordinary processes of the law. True it is that in certain cases, involving historic functions of the state, the law is too well settled to admit of doubt or of any nice balancing of interests to determine whether or not judicial processes may be evoked. But where the law cannot be said to be plainly settled, it becomes the duty of the court to determine whether or not the public needs militate against the enforcement through the appropriate judicial channels of the ordinary rules of justice.

The question is not merely whether the function in issue is governmental or private; it is doubtful whether any activity of the state may properly be called private. The public service functions of the state today may be as important in their bearing and as public in their character as the more limited functions to which it was the custom of the state to confine itself a century ago. In developing this field of law, expressions used by the courts have often been inept and inaccurate; the dis-

tinctions drawn in specific cases specious and negligible. Yet a sound principle, though at times, perhaps dimly discerned and mistakenly applied, underlies the cases. The principle is developing in the field of municipal corporations. *City of Los Angeles* v. *Los Angeles Gas Corporation*, 251 U. S. 32. The principle also finds application in the delimitation of the sphere in which the instrumentalities of a state are immune under our constitution from federal taxation. *South Carolina* v. *U. S.*, 199 U. S. 437. While these cases involve the question of substantive liability rather than procedural immunity, the analogy is none the less pertinent; in my opinion, a government ship should not be immune from seizure as such, but only by reason of the nature of the service in which she is engaged.

And as the *Pesaro* was employed as an ordinary merchant vessel for commercial purposes at a time when no emergency existed or was declared, she should not be immune from arrest in admiralty, especially as no exemption has been claimed for her, by reason of her sovereign or political character, through the official channels of the United States.

But if I err in believing that the accepted law of this country does not require a holding that merchant vessels owned and operated as such by a foreign sovereign state are, therefore, exempt from seizure, the *Pesaro* would, nevertheless, not be entitled to immunity.

I do not base this upon the fact that ships owned and operated for commercial purposes by the United States would not be exempt from ordinary process under Italian law, for retaliation and reprisal are for the executive branches of our government and not for the courts. *The Nereide*, 9 Cranch, 388, 442; *Bank of Augusta* v. *Earle*, 13 Pet. 519, 589; *Beale I Conflicts of Law*, Part I, p. 103. The doctrine of reciprocity in *Hilton* v. *Guyot*, 159 U. S. 113, should not be extended to a case involving the very jurisdiction of the court.

But the fact that the steamship *Pesaro* itself is sub-

ject to the ordinary processes of the Italian Court would seem to be vital and decisive. There is no reason of international comity or courtesy which requires that Italian property not deemed *extra commercium* in Italy, should be treated as *res publica* and *extra commercium* in the United States. In *Bank of U. S.* v. *Planters' Bank of Georgia,* 7 *Wheaton,* 904, Chief Justice Marshall said: "The State of Georgia, by giving to the bank the capacity to sue and be sued, voluntarily strips itself of sovereign character, so far as respects the transactions of the bank and waives all privileges of that character. * * * We think that the Planters' Bank of Georgia is not exempted from being sued in the Federal Courts, by the circumstance that the state is an incorporator." So it may be said here that the Italian Government, by giving to the *Pesaro* the capacity to be sued in the Italian Courts, voluntarily strips the *Pesaro* of its sovereign character and waives all privileges of that character; and that therefore the *Pesaro* is not exempt from suit in the United States, by reason of its governmental ownership and operation. For if a libel can be maintained against the steamship *Pesaro* in the Courts of Italy, it is difficult to see why our tribunals should decline jurisdiction: there is less reason therefor in a case of this sort than in *The Belgenland,* 114 U. S. 355.

October 1, 1921.

JULIAN W. MACK,
U. S. C. J.

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In the Supreme Court of the United States.

OCTOBER TERM, 1921.

No. 21, Original.

In the matter of the petition of the United States of America, owner of the American steamship *Western Maid*, for a writ of prohibition and/or a writ of mandamus against the Honorable J. Whittaker Thompson, Judge of the District Court of the United States for the Eastern District of Pennsylvania, and the other judges and officers of said court.

No. 22. Original.

In the matter of the petition of the United States of America, former requisitioned or chartered owner of the auxiliary schooner *Liberty*, for a writ of prohibition and/or a writ of mandamus against the Honorable James M. Morton, Jr., Judge of the District Court of the United States for the District of Massachusetts, and the officers of said court.

No. 23, Original.

In the matter of the petition of the United States of America, former requisitioned and chartered owner of the American steamship *Carolinian*, for a writ of prohibition and/or a writ of mandamus against the Honorable John C. Rose, Judge of the District Court of the United States for the District of Maryland, and the officers of said court.

I.

Issues presented.

These applications, representative cases of a group of several hundred admiralty proceedings, involving many millions of dollars, present the following basic questions:

1. Whether Army troop and cargo transports, or Navy dispatch or guard boats, unarmed public vessels of the United States, while serving military needs during war emergency, can incur lien liabilities for collision losses, enforcible by admiralty proceedings *in rem* against such vessels after their release from such public service and their commitment to merchant service? or,

2. Whether or not the fiction of the admiralty and maritime practices, which personifies the commercial vessel and declares her an offender and responsible for collision losses, can in like degree personify unarmed public Government vessels—instruments of national defense, and subject such public vessels to lien liabilities for collision losses? or,

3. Whether or not the doctrine of Government immunity includes immunity from liability, as well as immunity from process; whether or not the privileges and prerogatives of sovereignty do not declare the sovereign's property devoted to public service exempt from lien liabilities in all jurisdictions?

4. Whether or not section 9 of the shipping act of 1916 waives the immunity of Government-owned

ships from arrest for losses arising out of their operation in public service—not merchant service?

II.

Classes of Government vessels.

A statement of the classes of vessels controlled by the Government during the war period is essential to a proper understanding of the questions thus presented. These classes are:

(*a*) Armed public vessels;
(*b*) Unarmed public vessels;
(*c*) Merchant vessels.

(*a*) Armed public vessels consisted of Government-owned or requisitioned or chartered vessels on the bare-boat basis, of adaptable design, which were converted into fighting ships. Included were tugs or smaller steamships equipped with mine-laying or mine-sweeping devices, which were employed in such operations. After the war the Government removed the fighting gear, reconditioned the vessels, and redelivered them to owners, who then obtained proper merchant licenses and placed them in merchant service.

(*b*) Unarmed public vessels, also *meeting the public needs of the Government as sovereign*, consisted of Government-owned or requisitioned or chartered vessels on the bare-boat basis, which were converted into partially armed or unarmed transports—carriers of troops and of ammunition, food, and clothing for the American Expeditionary Forces and for the other

branches of the Government. Many were employed as Army and Navy dispatch boats in and about harbors. In most instances they were manned by naval crews, and placed under the control of the Army or Navy. These vessels, after their distinctly public service had ceased, had their Government gear removed, were reconditioned, proper merchant licenses obtained, and then were placed in merchant service. The steamships *Western Maid*, and *Carolinian* and the auxiliary schooner *Liberty* belong to this class.

(*c*) Merchant vessels consisted of Government owned or requisitioned vessels which were carriers of cargo and passengers for hire. The operation of each was a business enterprise designed for profit. The characteristics of the vessels of this class were their private merchant functions.

The jurisdictional questions presented relate solely to armed and unarmed public vessels of classes "A" and "B" and not to merchant vessels of class "C." The Government, by legislation, has consented to suit against its merchant vessels for collision losses sustained when such vessels are "purchased, chartered, or leased" from the Government and then while "solely employed in merchant service." (*The Lake Monroe*, 250 U. S. 246.) It has not waived its prerogatives of sovereignty, which declare its armed or unarmed transports and other vessels performing distinctly public service free of seizure or of liability or lien for collision losses.

III.

History of proceedings.

1. The *Western Maid*, a vessel at all times owned by the Government, while manned by the Navy and employed in the Army cargo transport service, on January 10, 1919, was in collision with the privately owned steamship *British Isles*. Later, after the *Western Maid's* release from the transport service and her return to the Shipping Board and commitment to merchant service, the owners of the *British Isles*, by authority of section 9 of the shipping act of 1916, filed a libel *in rem* against the *Western Maid* to recover such collision damages, demanding that process issue for the arrest or attachment of the *Western Maid* and that she be sold to pay the damages. The United States, appearing specially and without waiving any jurisdictional questions, filed its suggestion of want of jurisdiction, averring—

(1) That, as the *Western Maid* at all times has been a Government-owned vessel, and at the time of the collision had a distinctly public status, then being manned by a Navy crew and employed by her sovereign owner in the Army transport service, serving military needs during a war period, no suit could be maintained against the vessel *in rem*. Section 9 of the shipping act of 1916 has no application.

(2) That such proceedings, in substance and effect, were an action against the Government for a tort, alleged to have resulted from the incompetence or

want of skill of naval officers commissioned to man the *Western Maid*, and that for the responsibility for such losses this Government has not consented to suit.

(3) That, as the *Western Maid* at the time of the collision had a distinctly public status and then was employed as an instrument of sovereignty, in the exercise or manifestation of sovereign power, no liability or lien, by the happening of the collision, attached to the *Western Maid*, so as to become the subject matter of a libel *in rem* against her at any time. Her identity as a public vessel was merged in her sovereign owner; she cannot have an existence or personality separate and apart from her sovereign owner. The fiction of the personality of a vessel as applied to commercial vessels has no application to public vessels employed as instruments of sovereignty.

The district court ruled that, although at the time of the collision the *Western Maid* was manned by the Navy, operated and controlled by the War Department, and employed in public service, yet, as at the time the libel was filed the vessel has been released from war service and had been assigned to commercial service in which she was employed at the time of her seizure, the court had jurisdiction. It held, adopting the admiralty fiction which personifies the commercial ship, that the mere happening of the collision impressed upon the Army transport devoted to public service lien liabilities therefor, which, although then

not enforcable, survived and lived with the vessel and became enforcable upon the vessel's commitment to merchant service. Section 9 of the shipping act of 1916 is stated to be related legislation.[1]

2. The auxiliary schooner *Liberty*, owned by the Boston Pilots, was requisitioned by the Government for war service. The Government duly commissioned her a naval vessel, manning her with commissioned officers and enlisted men of the Navy, and employed her as a guard boat in Boston Harbor—distinctly military service. On December 24, 1917, the Navy boat *Liberty* was in collision with the privately owned steam tug *Eureka*. Later, after the Navy Department had reconditioned the *Liberty*, released her from requisition, canceled her requisition charter, and redelivered her to the Boston Pilots, her owners, the owners of the *Eureka* filed a libel *in rem* against the *Liberty* to recover such collision damages. The United States attorney, appearing specially, filed a suggestion under authority of section 4 of the "Suits in Admiralty Act" (*infra*) and obtained the release of the vessel. Subsequently he filed the usual form of suggestion, denying that such collision losses could be asserted against the vessel *in rem*, for the reason that, as the *Liberty* was a naval vessel, devoted to military operations, no lien liability by the mere happening of the collision was impressed upon the vessel, and, therefore, none was enforcable by libel *in rem*

[1] The district courts have made similar rulings in the following cases: *The Jeanette Skinner*, 266 Fed. *396*; *The F. J. Luckenback*, 267 Fed. 931; *The Gloria*, 267 Fed. 929; *The Florence H.*, *248* Fed. *1012*; *The Mavisbrook*, 270 Fed. 1011.

against the vessel at any time. The public service of the *Liberty* at the time of the collision declared her immune from lien liabilities for resulting losses. The district court overruled the suggestion upon the same reasoning as in the *Western Maid* opinion.

3. The S. S. *Carolinian*, privately owned, was requisitioned by the Government and allocated to the War Department for military service. On February 15, 1918, the *Carolinian*, then an Army transport, was in collision with the privately owned British steamer *Mavisbrook*. Later the *Carolinian* was reconditioned, released from service, and returned to her owners, when the owners of the *Mavisbrook* filed a libel *in rem* against the *Carolinian* to recover such collision damages. The Government, by authority of section 4 of the "Suits in Admiralty Act" (*infra*), filed its suggestion and obtained the release of the *Carolinian* from attachment. Later it filed a suggestion of want of jurisdiction, substantially in the same form as in the above cases, which the District Court overruled for the same reasons.

These applications to this court were then made. The issues now before this court are as thus indicated.

IV.

Related legislation.

1. SECTION 9 OF THE SHIPPING ACT.

Unless section 9 of the shipping act of September 7, 1916 (c. 451, 39 Stat. 728, 730), has waived the immunity of the United States and its vessels from

suits *in rem* for losses arising while such vessels are employed by the Government as unarmed public vessels—in war service—the District Court, in any view, was without jurisdiction in the *Western Maid* case.

This section provides:

> Every vessel *purchased, chartered, or leased* from the board shall, unless otherwise authorized by the board, be operated only under such registry or enrollment and license. Such vessels while *employed solely as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels* whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein. * * * (Italics ours.)

By this section any liabilities to which Government vessels became subjected must relate to collision liabilities arising from and during their employment solely as merchant vessels. The Government has not consented that such vessels may be sued *in rem* for collision losses arising while they are employed as instruments of sovereignty. Both the collision loss and the enforcement of the claim against the vessel must occur while the Government vessel is employed solely as a merchant vessel, and then is *operating for the account of others than the Government*, under charter or lease.

The *Western Maid* was property of the United States, at all times in its possession, and, except by its consent, was immune from judicial process. The

waiver of the immunity of the United States from suits *in rem* against its vessels, by the provisions of section 9 of the shipping act of 1916, relates only to vessels "*purchased, chartered, or leased*" from the Government, and *then only with respect to liabilities arising or created when such vessels are "employed solely as merchant vessels.*"

As stated by Judge Ward in *The Carlo Poma*, 259 Fed. 369, 370, "the vessels referred to (sec. 9) are such as are operated, not by the Government, but by persons who have purchased, leased, or chartered them from the Government." The *Western Maid*, at the time of the collision, was operated by and for the Government and distinctly as a public vessel.

Section 9 of the act only becomes applicable when the collision, the subject of the libel, has happened while the vessel is employed as a merchant vessel. The vessel lies open to obligation only "while employed solely as a merchant vessel." The United States has not waived immunity from suits against its vessels for collision losses or damages incurred when such vessels are employed in public service.

The history of this legislation confirms this. (See hearings before the Committee on the Judiciary, House of Representatives, 66th Cong., 1st sess. on H. R. 7124, Serials 4 and 8.) Its purpose, as this court has suggested in the *Lake Monroe* case, 250 U. S. 246, 255, 256, was "*to subject them to the same duties and liabilities as privately owned* merchant vessels with which they competed. * * * Her

(*Lake Monroe*) service at the time (*of the collision*) was purely commercial * * * ." The commercial employment of the *Lake Monroe, at the time of the collision,* brought her within the operation of section 9.

Under section 9 the exposure to liability must exist only *during merchant service. The evil or injurious occurrence must happen while the vessel is "employed solely as a merchant vessel."* The liability, the subject of the claim, must arise from the vessel's employment or operation in merchant service. Otherwise section 9 has no application.

As the *Western Maid, at the time the collision occurred,* was not "purchased, chartered, or leased" from the Government, and was not then "employed solely as a merchant vessel," but was an instrument of sovereignty employed in war service, the present libel proceedings against her can not be maintained. Otherwise section 9 must be interpreted and applied as waiving the immunity of vessels of the United States from suit for liabilities resulting from the employment of Government vessels in distinctly public service.

Section 9 must be construed and applied strictly.

> Beyond the letter of such consent (of the United States to be sued) the courts may not go, no matter how beneficial they may deem it or in fact might be their possession of a larger jurisdiction, over the liabilities of the Government. *Schillinger* v. *United States,* 155 U. S. 163, 166.

In this view, the *Western Maid* was not subject to arrest, the district court was without jurisdiction and the writ of prohibition should be granted.

UNSUCCESSFUL EFFORTS TO OBTAIN GENERAL RELIEF FROM CONGRESS FOR COLLISION DAMAGES CAUSED BY PUBLIC VESSELS.

That the construction of section 9, *supra*, as suggested, is proper, is confirmed by the earnest requests made to Congress on several occasions by admiralty counsel, representing both foreign and domestic interests, to subject public vessels to the liabilities of merchant vessels and to provide remedies for the enforcement thereof. (See hearings before the Committee on the Judiciary, House of Representatives, 66th Cong., 1st Sess., on H. R. 7124, Serial 4, pp. 28, 29, and Serial 8; Congressional Record, 66th Cong., 2d Sess., volume 59, pp. 1829, 1833, 3548; also hearings before the Committee on Commerce, United States Senate, on S. 2253, p. 30.) After thorough consideration, Congress refused to subject public vessels to the admiralty jurisdiction or to grant a remedy *in personam* against the Government. Congress thus has expressed its opinion that the public interests did not demand that public vessels be subjected to the incurment of liabilities under the maritime law or to the enforcement of those liabilities by process against the Government. Congress reserved to itself the right to grant such relief as it desired in each individual case.

2. SECTION 4 OF THE "SUITS IN ADMIRALTY ACT."

Under section 9, many Government merchant vessels were attached for liabilities incurred during merchant service, requiring the entry of stipulation to secure the vessels' release. This was an economic waste, as the Government was the responsible party and always present. Consequently Congress passed the "Suits in admiralty act," dated March 9, 1920 (41 Stat. 525), prohibiting the arrest of Government-owned vessels, but authorizing suits *in personam* against the Government, with an election to proceed upon *in rem* principles. Thus the act is procedural only. Only Government vessels employed in the merchant service are subject to its provisions. As the Government then was selling or releasing its fleet to private parties, free of liens, in order to perfect the transfer and relieve the purchasers or others from embarrassments resulting from the arrest of the vessel upon liabilities alleged to have arisen during the Government's possession and control, section 4 was enacted to read:

> That if a privately owned vessel not in the possession of the United States or of such corporation is arrested or attached upon any cause of action arising or *alleged to have arisen from previous possession, ownership, or operation of such vessel by the United States* or by such corporation, *such vessel shall be released without bond or stipulation therefor upon the suggestion by the United States, through its Attorney General or other duly authorized law officer, that* it is interested in such cause, *desire*

such release, and assumes the liability for the satisfaction of any decree obtained by the libelant in such cause, and thereafter such cause shall proceed against the United States in accordance with the provisions of this act. (Italics ours.)

The purposes served by this section and its limitations are fully defined by the debates in Congress at the time of its enactment (Congressional Record, vol. 59, p. 1832):

> Mr. WALSH. Mr. Chairman, I move to strike out the last word.
>
> This section 4 is the one that relates to vessels which have previously been operated by the United States and have since passed into private ownership. Do I understand that it is the intention now, if suit is to be brought within two years after a collision occurs for damages which resulted while the vessel was being operated by the United States, but after she is returned to private ownership that the United States steps in and furnishes this stipulation and assumes the liability for the satisfaction of the decree and releases her from arrest, and so forth, just as if the United States still owned the vessel?
>
> Mr. VOLSTEAD. It is my understanding, * * *.
>
> Mr. HUSTED. *The United States*, it seems to me, would be in *exactly the same situation as to causes of action which arose after the United States Government parted with the possession of the ships as she would be in reference to causes*

of action that arose while she was in possession of the ships.

We have provided by the bill that, as to causes of action arising while the United States owns and is in possession of the ship, we dispense with the giving of any bond. The vessels are declared to be immune from arrest and seizure and from all process in the admiralty courts. But this is to cover the case of a vessel that was in collision, perhaps, while in the ownership and possession of the Government, but where no suit was started, and then she is sold to private owners and the Government is subsequently sued; and the vessel, not now being under the ownership and possession of the Government, therefore she would be liable as a private vessel and subject to arrest and seizure, just exactly as any other private vessel when sued. Where the United States is concerned, we provide here, by the suggestion of the Attorney General, that the Government will assume responsibility; that this bond may be done away with; that the bond which the Government of the United States might otherwise be subject to will be dispensed with. (Italics ours.)

The filing of suggestions under section 4 only determines the United States as claimant for the vessel and substitutes its credit for the payment of the decree finally entered, if any, in place and stead of the usual bond or stipulation for value otherwise entered to secure the release of a vessel from attachment. The proceedings continue as proceedings *in rem*.

Manifestly, if the libel does not state a cause of action, *in rem* against the vessel, this section can not create one.

The propriety for the Government filing its suggestion by authority of section 4 of the act in the *Carolinian* and *Liberty* cases is thus indicated. The Government, by the suggestion, only assumes responsibility for the payment of any decrees which the district courts, upon the libel and proofs, properly could enter against the ships themselves, upon *in rem* principles. If there is no *in rem* liability established on the part of the vessel, the libel must be dismissed.

V.

The Liberty and Carolinian are vessels belonging to the Government.

The *Liberty* and the *Carolinian*, by the terms of the bare-boat charter entered upon between owners and the Government, during the period of requisition, were vessels belonging to the Government. They were instruments of sovereignty—public vessels.

> *Baltimore Drydocks and Shipbuilding Company* v. *New York and Porto Rico Steamship Company, Owner, and the United States of America, Intervenor*, 262 Fed., 485;
>
> *The Masters, Wardens, and Assistants of the Trinity House* v. *Clark*, 4 M. & S. 288 (King's Bench, 1815–16);
>
> *The Sarpen*, L. R., P. D. (1916) 306; *The Matti*, L. R., P. D. (1918) 314;
>
> *Admiralty Commissioners* v. *Page and others*, L. R., K. B. (vol. 1 (1919) 299;

Thorpe v. *Hammond*, 12 Wall. 408, 415–417;
The Barnstable, 181 U. S. 464, 468.

The drafting of such privately owned vessels for war purpose and their actual employment for national defense declare them instruments of sovereignty.

VI.

The immunity from liability of public vessels.

1. GOVERNMENT NOT RESPONSIBLE FOR THE TORTS OF ITS OFFICERS OR AGENTS.

It must be conceded that the present libel relates solely to a tort committed by commissioned naval or Army officers in the control and operation of Army transports or Navy vessels serving public needs during an emergency. Unless there is some magic in such public vessels' personification, the Government can not be held for these torts. There is no distinction between the Government and its property. There should be no relief by indirection where Congress has not provided relief directly.

Bigby v. *United States*, 188 U. S. 400, 408;
Langford v. *United States*, 101 U. S. 341, 344;
Gibbons v. *United States*, 8 Wall. 269, 274.

Where it is proper for the Nation to assume liability and furnish a remedy, Congress wisely has reserved the matter for its own determination. We must assume that, at the proper time and as it is requested, diplomatically or otherwise, Congress will give these claims the consideration they merit.

2. PUBLIC VESSELS ARE PART OF THE SOVEREIGN STATE AND THEIR LIABILITIES ARE MERGED IN THOSE OF THE SOVEREIGN.

It also must be conceded that under local laws liens can neither be acquired nor enforced upon or against the property of the Government held for public use. The privileges and prerogatives of sovereignty, accorded the sovereign, are impressed upon the sovereign's public property.

> *United States* v. *Ansonia Brass and Copper Co.*, 218 U. S. 452;
>
> *Board of Commissioners* v. *O'Connor*, 86 Ind. 531–537;
>
> *Rowley* v. *Conklin*, 89 Minn. 172, 175.

There ought to be no distinction between the Government and its property devoted to public uses. Such public property is merged in its sovereign, and redress must be sought from the sovereign and not from the instrument he uses in the exercise of its legitimate functions. The exemption of its (armed or unarmed) public vessels, employed to serve war needs in an emergency, from suits in admiralty arises, not out of a want of power to sue the public owner, but out of a want of liability on the part of the vessel.

These observations find full confirmation in the views stated by Mr. Chief Justice Waite, then sitting on the Circuit Bench for the Southern District of New York, in *The Fidelity*, 16 Blatchf. 569, 572, 573; 8 Federal Cases, 4758 (on appeal from the District Court):

"A careful examination of the cases satisfies me that the *exemption of public vessels* from suits in admiralty arises not out of a want of power to sue the public owner, but out *of a want of liability on the part of the vessel.* A public vessel is part of the sovereignty to which she belongs and her liability is merged in that of the sovereign. Under such circumstances redress must be sought from the sovereign and not from the instruments he uses in the exercise of his legitimate functions. Public creditors *look to the public faith for their security and not to the public property.* But it is insisted that during the public ownership the maritime liability of the vessel may be incurred, although the remedy in admiralty is suspended. If this be so, the seamen employed on vessels of war, if their wages are not paid and their vessel is sold to private owners, to be employed in the ordinary business of commerce, may libel the vessel in the hands of her private owners to secure their money. A simple statement of such a proposition is all that is required to show its fallacy. *The real truth is that in such cases the maritime law passes by the thing and places the liability on the sovereign owner alone and not upon the maritime instrumentalities of his sovereignty.* The cases of *The Davis*, 10 Wall. (77 U. S.) 15, and *The Siren*, 7 Wall. (74 U. S.) 152, are not at all in conflict with this. * * * I do not understand that *The Siren* and *The Davis, supra*, go further than to decide that the property of the Government not devoted to the public

use is subject to such liens." (See the *F. C. Latrobe*, 28 Fed. 373, 379.) [Italics ours.]

Pertinent observations made by the Court of Appeals of England in *The Parlement Belge* (4 Asp. M. C. at p. 234) are instructive:

Brett, L. J.—

> "I doubt very much whether a maritime lien would attach to a vessel after leaving the Government service for damage done by her whilst in the service."

Baggley (p. 237):

> "Suppose damage is done *by a ship of war* which is subsequently sold by the Government to a private individual, do you *say* that a lien would attach to her in the hands of her new owner for the damages done whilst a vessel of war?"

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> "We think he (sovereign) can not be indirectly pleaded any more than he could be directly pleaded."

The argument of the King's advocate in the case of *The Prins Frederik* (2 Dods. 451) is sound and persuasive.

These vessels, utilized as part of the military forces, supporting the sovereign power and maintaining its dignity and independence, can not have a personality separate and apart from their sovereign owner.

3. THE LAW MERCHANT PERSONIFIED THE COMMERCIAL SHIP NOT A PUBLIC SHIP.

The personification of a vessel declared by the law merchant and adopted by the admiralty and maritime practices, with relation to vessels employed in commercial trade, is fully accredited and the soundness of the rule is conceded. In theory, *as applied to commercial vessels*, the mere happening of a collision impresses upon such vessel a lien liability for the resulting damages, which travels with the thing wherever she goes and into whosesoever hands she may pass. It is a *jus in re*, conferring upon the party damaged a proprietary interest or privilege in commercial vessels. It is inchoate from the moment it attaches.

The commercial usages look upon the ship as the surest pledge for the compensation and indemnity of the injured party. Such hypothecation—the commitment of the security of the merchant vessel to satisfy claims and demands against her—is a commercial necessity. Her personification is a rule of indemnity. The origin of the rule and its purposes thus have been summarized. By Mr. Justice Grier in *Vandewater* v. *Mills*, 19 Howard, 82, 83:

> A maritime "privilege" or lien is adopted from the civil law and imports a *tacit hypothecation of the subject of it.*

By Mr. Justice Story in *United States* v. *Brig Malek Adhel*, 2 Howard 209, 234:

> The ship is also by the general maritime law held responsible for the torts and misconduct of the master and crew thereof upon the general policy of that law which looks to the instrument itself, used as the means of the mischief, as *the best and surest pledge for the compensation and idemnity of the injured party.*

In *The China*, 7 Wall. 53, 68:

> It had its source in the *commercial usages* and jurisprudence of the middle ages * * * It gave him (creditor) a lien or privilege against it in preference to other creditors.

In *Eugene F. Moran*, 212 U. S. 466, 474:

> No doubt the fiction that a vessel may be a wrongdoer and may be held, although the owners are not personally responsible on principles of agency or otherwise, is carried further here than in England. * * * Possibly the *survival of the fiction* has been helped *by the convenient security that it furnishes* just as no doubt the responsibility of a master for a servant's torts, that he has done his best to prevent, has been helped by the feeling that it is desirable to have someone who is able to pay.

In *The Young Mechanic*, 2 Curtis, 404, 410, 411.

> In my opinion the definition given by Pothier of an hypothecation is an accurate description of a maritime lien under our law.

> "The right which a creditor has in a thing of another, which right consists in the power to cause that thing to be sold, in order to have the debt paid out of the price. This is a right in the thing, a *jus in re*." * * * A right which enables a creditor to institute a suit, to take a thing from any one who may possess it, and subject it by a sale to the payment of his debt; which so inheres in the thing as to accompany it into whosesoever hands it may pass by sale; which is not divested by a forfeiture or mortgage, or other incumbrance created by the debtor, can only be a *jus in re*, in contradistinction to a *jus ad rem*, or in contradistinction to a mere personal right or privilege. Though tacitly created by the law, and to be executed only by the aid of a court of justice, and resulting in a judicial sale, it is as really a property in the thing as the right of a pledgee, or the lien of a bailee for work.

(See Holmes on *The Common Law*, p. 25; Mayer's Admiralty Law and Practice, p. 8.)

Commercial vessels are sent in trade to all ports. Their owners are usually inaccessible for purposes of suit, and their personal responsibilities are uncertain. The necessities of the vessel's operation in merchant service demand that the vessel, the res, shall be responsible for her torts and contracts. Her personification or hypothecation accomplishes this. The bases of the laws governing merchant vessels is in aid of commerce, but can or should this rule, as applied to commercial vessels, personify or hypothe-

cate Government vessels devoted to military operations in times of war—instruments of national defense during the period of an emergency? Such public vessels, devoted to national service, represent the Nation at war, or as attempting to effect national purposes. Perfect freedom from liability and freedom of action are essential to their employment. Ought the subjects of a foreign nation or our own citizens, through the happening of a collision, secure a *jus in re*, a proprietary interest, in a Government military vessel or other public vessel; ought they become co-owners with the sovereign?

The rule of reason is that a Government vessel, employed as an instrument of sovereignty—an Army transport, in aid of the national defense during an emergency—has her identity merged in her sovereign. When her devotion to public service ceases and she becomes an instrument in merchant service, *she assumes a new personality—a merchant vessel*, free of and unhampered by any liens or claims alleged to have arisen during her public service. An Army cargo transport personified is not the merchant vessel personified.

The theory finds support in the fact that no reported cases, prior to the armistice, have been found where foreign or domestic shipowners have attempted to recover collision damages, inflicted by a public vessel devoted to military service, by proceeding *in rem* against such public vessel after she has been sold or released by the Government and placed in commercial service.

War is the supreme test of sovereignty. The sovereign becomes all-powerful. The personal liberty of the citizens must be surrendered to it in war time. The personality of the man, by draft legislation, was absorbed by the Government. Surely the identity or personality of the ship must be—she became a mere tool of the sovereign and used as a weapon of national defense. By what right can rules of admiralty be allowed to assert superior claims for a public vessel, drafted by the War Department and utilized for public purposes?

This court, in its opinion delivered June 1, 1921, in *Ex-parte In the Matter of the State of New York, Edward S. Walsh, Superintendent*, etc., No. 25 Original, October Term, 1920 (unreported), denies that "the uniform operation and effect of the characteristic principles and rules of the maritime law as a body" can impose itself upon and overrule the privileges and prerogatives which belong to the sovereign. As stated:

> It is not inconsistent in principles to accord to the States, which enjoy the prerogatives of sovereignty to the extent of being exempt from litigation at the suit of individuals in all other judicial tribunals, a like exemption in the courts of admiralty and maritime jurisdiction.

As there can be no distinction between the Government and its property devoted to public use, is not this conclusion sound—that vessels or property of a sovereign, devoted to public uses, which enjoy exemption from lien liability or litigation, in all other judicial

tribunals, enjoy like exemption in the courts of admiralty and maritime jurisdiction? The fiction of the admiralty law which personifies commercial vessels cannot, in like degree, personify public vessels, and impose upon them liabilities which are inconsistent with the privileges and prerogatives of sovereignty with which they are endowed.

4. SOVEREIGN IMMUNITY INCLUDES IMMUNITY FROM LIEN LIABILITY, AS WELL AS IMMUNITY FROM PROCESS.

No purposes can be served by reviewing the cases discussing procedural immunity, as this rule is definitely established. See *In re Muir*, 256 U. S. 000; *In re Hussein Bey*, 256, U. S. 000; *Ex parte, In the Matter of the State of New York*, Nos. 25, 26, Original, October Term, 1920 (unreported).[1]

Nor can the group of cases which have permitted actions for salvage and general average contribution, quasi contractual relations for which a liability

[1] The English cases discussing procedural immunity are *The Prinz Frederick*, 2 Dod. 451; *The Constitution*, L. R., P. D. 39 (1879); *Mighell* v. *Sultan of Johore*, Q. B. D., vol. 1 (1894), 149; *The Parlement Belge*, 4 Asp. M. C. 234; *Young* v. *Sebtia*, 1903, A. C. 501; *The Jassy*, 1906 Prob. Div. 270; *The Broadmayne*, 1916, Prob. Div. 64; *The Gagara*, 1919, Prob. Div. 95; *Porto Alexandra*, 1920, Prob. Div. 30; *The Athol*, 1 W. Rob. 382 (1842); *The Resolute*, 33 L. T. 80; *The Thomas A. Scott*, 10 L. T. (U. S.) 729; *The Charkieh*, L. R., 4 A., and E. 59 (since overruled); *The Mexicano*, 22 T. L. R. 519; *The Errisos*, Lloyd's List, Oct. 21, 1917, p. 5, 8.

The American cases are *In re Hussein Lufti Bey* (256 U. S.); *In re Muir*, 255 U. S.; *The Maipo*, 252 Fed. 627, aff. 259 Fed. 367; *The Carlo Poma*, 259 Fed. 369; *The Pessaro* (U. S. D. C., S. D. N. Y. decided Oct. 1, 1921); *The Attualita*, 238 Fed. 909; *The Pampa*, 245 Fed. 137; *The Athanasios*, 228 Fed. 558; *The Adriatic*, 258 Fed. 902; *The Roseric*, 254 Fed. 155; *The Luigi*, 230 Fed. 493; *The Exchange*, 7 Cranch. 117; *The Santissima Trinidad*, 7 Wheat. 283 (1822); *The Invincible*, 2 Gall. 29 (1814); *Briggs* v. *The Light Boats*, 11 Allen 157; *Mason* v. *Intercolonial Railway*, 197 Mass. 349.

in personam exists against the Government, *to be enforced against Government property, not in its possession nor devoted to public use*, aid in the solution of the present questions. *The Davis*, 10 Wall. 15; *Long* v. *Tampico*, 16 Fed. 491; *The Johnson Lighterage Co. No. 24*, 231 Fed. 365.

A maritime lien may not exist in a cause of collision *when the thing occasioning the tort was not the subject of a maritime lien.* (*The Rock Island Bridge*, 6 Wall. 213.) If the doctrine of immunity includes immunity from liability, as well as process, Government vessels devoted to public service can not be the subject of liens. *The consent of the Government to suit secures legal recognition, not merely the enforcement of a right against the State.*

Mr. Justice Holmes, in delivering the opinion of this court in *Kawananakoa* v. *Polyblank*, 205 U. S. 349, 353, thus stated the American doctrine of immunity from liability:

> Some doubts have been expressed as to the source of the immunity of a sovereign power from suit without its own permission, but the answer has been public property since before the days of Hobbes (*Leviathan*, c. 26, 2). A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground *that there can be no legal right as against the authority that makes the law on which the right depends.* (Italics ours.)

The law is reviewed in *Riddock* v. *State*, 123 Pac. Rep. 450, 452 (Wash., 1912), and by the cases there cited, to which reference is made.

Laski's "*The Responsibility of the State in England*," 32 Harvard Law Review, 447, and Maguire's "*State Liability for Tort*," 30 Harvard Law Review, 20, are the most recent articles reviewing this much theorized subject.

The prerogatives of sovereignty include *immunity from liability, as well as immunity from process.*

In these views, the district courts were without jurisdiction of the subject matter of the proceedings, and the writs of prohibition should issue.

5. THE CASES OF "THE SIREN" AND "WORKMEN *v.* NEW YORK."

The district courts are of opinion that certain obiter dicta expressions in the cases of *The Siren*, 7 Wall. 152, and *Workman* v. *City of New York*, 179 U. S. 552, control. They imply (but without any reference to whether the property was devoted to public use) that Government vessels must be declared offenders for collision losses—that the mere happening of collision impresses upon such vessels lien liability therefor, which becomes enforcible when the vessels are subject to seizure under the process of the court. Upon the authority of this rule jurisdiction was assumed over these vessels.

The *Siren*, a privately enemy owned vessel, was captured February 18, 1865, at Charleston and ordered to Boston for adjudication as a prize. On

the way, while in charge of a pilot employed by the prize master, she collided with the sloop *Harper*. Later a libel in prize was filed, and thereunder the sloop was condemned and sold and the proceeds of sale, in the usual way, deposited in the registry of the court. The owners of the sloop then petitioned to have their collision losses, totaling about $300, paid out of the fund in court, the Government then having petitioned for a distribution of the fund.

The court found:

> It is a familiar doctrine of the common law, that the sovereign *can not be sued* in his own courts without his consent. The doctrine rests upon reasons of public policy; the inconvenience and danger which would follow from any different rule. It is obvious that the public service would be hindered, and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen, and consequently controlled in the use and disposition of the means required for the proper administration of the Government. The exemption from direct suit is, therefore, without exception. This doctrine of the common law is equally applicable to the supreme authority of the nation, the United States. They can not be subjected to legal proceedings at law or in equity without their consent; and whoever institutes such proceedings must bring his case within the authority of some act of Congress. Such is the language of this court in *United States* v. *Clarke*.

> The same exemption from judicial process extends to the property of the United States, and for the same reasons. As justly observed by the learned judge who tried this case, *there is no distinction between suits against the Government directly and suits against its property.* * * *
>
> * * * Here, however, the title was divested from the previous owner by the capture, that being lawful, and vested in the United States (in trust as to one-half for the captors), although the legality of the capture was not established until the sentence of condemnation. * * *
>
> For the damages occasioned by collision of vessels at sea a claim is created against the vessel in fault, in favor of the injured party. This claim may be enforced in the admiralty by a proceeding *in rem*, except where the vessel is the property of the United States. In such case the claim exists equally as if the vessel belonged to a private citizen, but for reasons of public policy, already stated, *can not be enforced by direct proceedings against the vessel.* It stands, in that respect, like a claim against the Government, incapable of enforcement without its consent, and *unavailable for any purpose.* * * *

However, it then stated the rule relied upon by the District Court:

> * * * Assuming, therefore, that the *Siren* was in fault, and that by the tort she committed a claim was created against her, we do not perceive any just ground for refusing

> its satisfaction out of the proceeds of her sale. *The Government is the actor in the suit for her condemnation. It asks for her sale*, and the proceeds coming into the registry of the court, come affected with all the claims which existed upon the vessel created subsequent to her capture. There is no authority, that we are aware of, which would exempt them *under these circumstances*, because of the exemption of the Government from a direct proceeding *in rem* against the vessel whilst in its custody.

The *Siren* is a prize cause, the subject—forfeiture as a prize. Forfeiture and prize cases stand apart from *in rem* proceedings to recover collision losses. The property was not devoted to public use—in no sense was it an instrument of sovereignty. The fund arising from the sale of the vessel was before the court for distribution. The Government, as actor, sought the distribution of the fund.

The sound distinction between the *Siren* and the instant cases is the one observed by Mr. Justice Waite in the *Fidelity, supra:*

> The *Siren* was a case of prize, and the question was, whether damages caused by a collision for which she was in fault, while on her way into port for adjudication, should be paid out of the proceeds of her sale on condemnation. *No question of public use was involved.* There was nothing to take it out of the general rules of the maritime law, *except public ownership*, and that, all will concede, is not enough. *Property does not necessarily become a part of the sovereignty because it is owned by the sovereign.*

> *To make it so, it must be devoted to the public use and must be employed in carrying on the operations of the Government.* There may be some expressions of the learned justices who wrote the opinions in these cases (*Siren*—the *Davis*) which, if separated from the facts then under consideration, would indicate that the lien extended to public vessels employed in the public service, as well as to others; but the question was not up for determination and it is proper, therefore, to confine the actual decision to the cases as they stand. (Italics ours.)

Or as observed in *Carr* v. *United States*, 98 U. S. 433, 439:

> It was held (in the *Siren*) that, inasmuch as the United States had resorted to the aid of the court to procure the condemnation of the *Siren* and had thus placed her proceeds in the course of judicial administration, any proper claims against the vessel itself *prior to that of the Government* might well be satisfied out of such proceeds. (Italics ours.)

The Government acquired the *Siren* subject to proper claims accruing prior to her condemnation and sale as a prize. At the time of the collision, the *Siren* was not Government property devoted to public use; at no time was she devoted to public use.

Workman v. *City of New York*, *supra*, has recently been considered by this court in *Ex parte State of New York et al.*, *supra*. The libel was *in personam* against a municipality, adjudged *not to be endowed with the privileges of sovereignty accorded the State.*

The obiter dicta expressions, stated in the majority opinion, should not control the determination of the important questions which the present case presents.

Is not this decision distinguishable from the present case for the following reasons?

(*a*) Both at the time of the collision (when the liability against the municipality was created) and at the time of suit, the City of New York (the municipal corporation), as respondent, was subject to the admiralty jurisdiction of the court for the loss in suit.

(*b*) It was a suit *in personam*. No maritime lien was involved. The question as to the liability of the fire boat *in rem* was not involved. The majority opinion (p. 572) expressly states that its opinion is not to be construed as deciding that a municipal corporation's vessel was liable *in rem*.

(*c*) *No question of sovereignty was involved.* The contention was that the "public use" by a private municipal corporation of a vessel owned by such private corporation exempted not only the vessel but also the private corporation from suit. This court held only that the municipal corporation was suable *in personam* for the tortious act of its agent, the master of the vessel. The majority opinion states (p. 566):

> We of course concede that where maritime torts have been committed by the officers of a sovereign and complaint has been made in a court of admiralty that court has declined to exercise jurisdiction * * *

(*d*) The decision was based upon the principle of respondeat superior, municipality, as principal, responsible for tortuous act of its officer, master of the fire boat. (See Opinion, p. 565.)

(*e*) The dissenting opinion of four justices limits the authority, if any, of the *obiter dicta* in the majority opinion.

VII.

The procedure adopted by the Government in the District Court was proper.

The return in the *Western Maid* case suggests possible criticism of the procedure adopted by the Government in the District Court. Process was issued against the *Western Maid* and, under the writ, the marshal took physical custody of the vessel (Pet., p. 20). Then, without admitting the jurisdiction of the court, and without submitting the rights of the United States to the jurisdiction, the United States made claim for the vessel (Pet., p. 18), and furnished stipulation for the release of the *Western Maid* (Pet., p. 21). This stipulation names the United States as owner and claimant and is signed by the United States Shipping Board Emergency Fleet Corporation as *stipulator*. (Pet., pp. 21, 22.) The condition of the stipulation is—

> * * * is such that if it shall hereafter be finally determined that this court has jurisdiction to proceed in said cause, and if claimant herein and the United States Shipping Board Emergency Fleet Coporation, the stipulator undersigned, shall abide by all orders

> of the court interlocutory and final and pay the amount awarded by the final decree * * * then this stipulation shall be void * * * .

The Government then filed its suggestion of want of jurisdiction. No traverse to the suggestion was filed, and the question of jurisdiction was heard and decided by the District Court upon the facts stated in the suggestion and supporting affidavit.

This procedure is proper—has been adopted by the Government in all its cases and has received universal approval.

> *The Lake Monroe*, 250 U. S. 246.
> *Ex-parte in the State of New York et al., supra* (opinions filed June 1, 1921).

This return also suggests that the Fleet Corporation has been made a direct party in interest. This must be conceded an error. The proceeding always has been and now is a *proceeding in rem*. The Fleet Corporation appears of record only as stipulator. The proceeding continues a proceeding *in rem*. It has not been and can not be translated into a proceeding *in personam* against the Fleet Corporation.

VIII.

The remedy by writ of prohibition is proper.

The returns filed also question the propriety of the present applications to this court.

The most recent opinion is *Ex parte In the matter of the State of New York*, No. 25, Original, October Term, 1920. This court said:

> The power to issue writs of prohibition to the district courts when proceeding as courts of admiralty and maritime jurisdiction is specifically conferred upon this court by section 234, Judicial Code (act of March 3, 1911, ch. 231, 36 Stat. 1087, 1156). And the fact that the objection to the jurisdiction of the court below might be raised by an appeal from the final decree is not in all cases a valid objection to the issuance of a prohibition at the outset, where a court of admiralty assumes to take cognizance of matters over which it has no lawful jurisdiction. *In re Cooper*, 143 U. S. 472, 495. * * *
>
> The want of authority in the district court to entertain these proceedings *in personam* under rule 59 (now 56) brought by the claimants against Mr. Walsh as superintendent of public works of the State of New York is so clear, and the fact that the proceedings *are in essence suits against the State without its consent is so evident, that instead of permitting them to run their slow course to final decree, with inevitably futile result, the writ of prohibition should be issued as prayed.* *Ex parte Simons*, 247 U. S. 231, 239; *Ex parte Peterson*, 253 U. S. 300, 305.

The district court was without jurisdiction to proceed against the *Western Maid*, and the district courts were without jurisdiction of the subject matter of all the libels—the liability of a public vessel for a tort.

IX.

Importance of the question.

There are more than *200 admiralty cases now pending in the district courts, with losses running into millions of dollars,* which will be controlled by the ruling in these cases, related cases now before this court. Congress, by appropriate action, has always provided relief for claims relating to war losses. It must be assumed Congress will properly provide redress in each of these cases when and as it considers it proper to do so. The procedure adopted in the instant case to collect a war claim is novel and without precedent.

The application of section 9 of the shipping act (*supra*) as suggested in the *Western Maid* case has been definitely raised in at least 30 cases, involving considerable sums of money. The Government suggests the immediate necessity for the ruling of this court upon the subject.

The hearings of these numerous cases are being delayed until after the questions now presented are ruled upon by this court.

X.

Conclusion.

The want of authority in the district court to entertain this proceeding *in rem* against the *Western Maid* or to assume jurisdiction over the subject matter of each of the libels is so evident that the writs of prohibition should issue as prayed. The relation

of this case to the several hundred other pending cases, involving the same substantial questions, justifies the Government in requesting that the questions submitted to this court now shall be fully determined.

Respectfully,

JAMES M. BECK,
Solicitor General.

ALBERT OTTINGER,
Assistant Attorney General.

J. FRANK STALEY,
Special Assistant to the Attorney General, in Admiralty.

○

[redacted]

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In the Supreme Court of the United States.

OCTOBER TERM, 1920.

No. —, ORIGINAL.

IN THE MATTER OF THE PETITION OF THE UNITED STATES OF AMERICA, AS FORMER REQUISITIONED OR CHARTERED OWNER OF THE AUXILIARY SCHOONER "LIBERTY."

MOTION FOR LEAVE TO FILE PETITION FOR A WRIT OF PROHIBITION AND/OR A WRIT OF MANDAMUS.

And now comes Harry M. Daugherty, Attorney General of the United States, on behalf of the United States of America, former requisitioned or chartered owner of the auxiliary schooner *Liberty*, and moves:

1. For leave to file the petition for a writ of prohibition and/or a writ of mandamus, hereto annexed, and

2. That a rule be entered and issued directing the District Court of the United States for the District of Massachusetts and the Honorable James M. Morton, jr., a judge thereof, and the officers of said court, to show cause why a writ of prohibition and/or a writ of mandamus should not issue against them and each of them, in accordance with the prayer of said petition, and why the United States of America should not have such other and further relief therein as may be just.

HARRY M. DAUGHERTY,
Attorney General of the United States.

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

No. —, ORIGINAL.

IN THE MATTER OF THE PETITION OF THE UNITED STATES OF AMERICA, FORMER REQUISITIONED OR CHARTERED OWNER OF THE AMERICAN AUXILIARY SCHOONER "LIBERTY," FOR A WRIT OF PROHIBITION AND/OR A WRIT OF MANDAMUS AGAINST THE HONORABLE JAMES M. MORTON, JR., JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS, AND THE OFFICERS OF SAID COURT.

MOTION AND PETITION FOR A WRIT OF PROHIBITION AND/OR A WRIT OF MANDAMUS.

To the honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Harry M. Daugherty, Attorney General of the United States, on behalf of the United States of America, former requisitioned or chartered owner of the auxiliary schooner *Liberty*, against the Honorable James M. Morton, jr., judge of the District Court of the United States for the District of Massachusetts, sitting in admiralty, and

against the officers of said court, respectfully represents:

First. That on February 5, 1921, the Staples Transportation Company, owner of the steam tug *Eureka*, filed its libel in the District Court of the United States for the District of Massachusetts, in admiralty, against the auxiliary schooner *Liberty*, to recover damages in the sum of $8,500, resulting from collision between the vessels on December 24, 1917, in Boston Harbor. It prayed that process, according to the course and practice in causes of admiralty and maritime jurisdiction, issue against the auxiliary schooner *Liberty* and that the court decree to libelant its damages and that the said schooner be condemned and sold to satisfy the same. A copy of the libel, as part of the record of proceedings in said court, is hereto annexed.

Second. That theretofore the auxiliary schooner, then privately owned, had been requisitioned or chartered upon the bare boat basis by the United States, represented by the commandant of the first naval district, acting under direction of the Secretary of the Navy, pursuant to authority granted by the act of August 29, 1916, and then was a vessel belonging to the United States. That at the time of the collision, the United States had commissioned her as a naval dispatch boat and employed her to serve military needs in war service. That, subsequently, the *Liberty* was released from requisition or charter and redelivered to her owners, who then employed her as a pilot boat, in which service the schooner was

engaged at the time of the filing of the said libel and her attachment thereunder.

Third. That thereafter, by virtue of the authority of section 4 of the act of Congress entitled "Suits in admiralty act," approved March 9, 1920 (41 Stat. 525), the United States filed its suggestion that it was interested in such proceedings, desired the immediate release of the auxiliary schooner *Liberty* from arrest or attachment without bond or stipulation, and that it assumed the liability for the satisfaction of any decree entered therein. Thereupon the said District Court directed the release of the said schooner from attachment, without bond or stipulation.

Fourth. That thereafter, Daniel J. Gallagher, the United States attorney for the District of Massachusetts, specially appearing on behalf of the United States for the purpose of questioning the jurisdiction of said court to proceed in said cause, filed of record suggestion that inasmuch as the *Liberty*, at the time of the collision, was a vessel belonging to the United States, employed by its Navy Department as a guard or dispatch boat to serve military needs, she was immune from liability or lien for collision damages, and the court was without jurisdiction to proceed against the vessel or to hear and determine the matters alleged in said libel. Copy of said suggestion, as part of the record of proceedings in said court, is hereto annexed.

Fifth. That thereafter the matter came on for hearing before James M. Morton, jr., the judge of

said court, upon the right of said court to assume jurisdiction or otherwise to hear and determine the matters alleged in said libel, who handed down an opinion in which, while finding the *Liberty* at the time of the collision was a vessel belonging to the United States and employed as a Navy dispatch or patrol boat to serve military needs, nevertheless overruled the Government's suggestion and assumed jurisdiction, and is proceeding to hear and determine the merits of the libel. Copy of said opinion, as part of the record of proceedings in said court, is hereto annexed.

Sixth. That a certified copy of the record of proceedings in said District Court of the United States for the District of Massachusetts, filed in the said cause, is hereto annexed and made a part hereof.

Seventh. That it is now represented that inasmuch as at the time of the collision the *Liberty* was a commissioned Navy dispatch or patrol boat employed by this sovereign petitioner to serve military needs, she was immune from liability or lien for said collision damages. Further, that said libel proceeding, in substance and effect, is an action against your sovereign petitioner and presents a claim for tort arising out of a collision alleged to have resulted from the incompetence or want of skill of naval officers commissioned to man and operate a naval vessel, and that for the liability of such losses this sovereign petitioner has not consented to suit. By reason thereof, the said District Court was, and is, without jurisdiction to proceed to hear and deter-

mine the matters alleged in said libel *in rem* filed against said schooner.

Wherefore, the said Harry M. Daugherty, Attorney General of the United States, the aid of this honorable court, respectfully requesting, prays:

1. That a writ of prohibition may issue out of this honorable court to the said Honorable James M. Morton, jr., judge of the United States District Court for the District of Massachusetts and/or the officers of said court, prohibiting him and them from taking any steps whatsoever in the cause aforesaid, and, generally, from the further exercise of jurisdiction in said cause, or the enforcing of any order, judgment, or decree made under color thereof.

2. That a writ of mandamus be issued out of and from this honorable court, directing and commanding the Honorable James M. Morton, jr., judge of the United States District Court for the District of Massachusetts, to vacate the order so entered by him, overruling the Government's exception to jurisdiction, and, to enter an order in said cause declaring the said auxiliary schooner *Liberty* immune from liability or lien for said collision damages.

3. That the court grant to the United States of America such other and further relief as may be just in the premises.

HARRY M. DAUGHERTY,
Attorney General of the
United States of America.

I have read the foregoing petition by me subscribed, and the facts therein stated are true to the best of my information and belief.

HARRY M. DAUGHERTY.

Subscribed and sworn to before me this 25th day of March, 1921.

[SEAL.] JULIA B. RISHEL,
Notary Public, District of Columbia.

TRANSCRIPT OF PROCEEDINGS IN DISTRICT COURT.

No. 1936. In Admiralty.

Staples Transportation Co., Libt., *v.* Auxiliary Schooner *Liberty*.

The libel in this cause was filed in the clerk's office of said court on the fifth day of February, A. D. 1921, and is as follows:

LIBEL.

To the Honorable James M. Morton, jr., judge of the United States District Court within and for the District of Massachusetts:

Staples Transportation Company, owner of the steam tug *Eureka*, exhibits this its libel against the auxiliary schooner *Liberty*, her boats, engines, boilers, machinery, tackle, apparel, and furniture, in a cause of collision civil and maritime, and thereupon alleges as follows:

First. The libellant is a corporation duly organized and existing according to law and having a usual place of business in Fall River in the District of Massachusetts, and at the time of the events hereinafter mentioned was the owner of the steam tug *Eureka*, a vessel of the burden of 353 tons gross, 186 tons net, 128 feet in length, 26.3 feet in breadth, and at said time tight, staunch, strong, well-manned, and equipped, and commanded by Ernest M. Plummer, a competent and experienced master.

Second. While said steam tug, having in tow on a hawser Consolidation Coal Company barge *No. 15*,

bound for the port of Boston in said district, was approaching Broad Sound Channel at the entrance to said port, at about 4.40 a. m., December 24, 1917, a red light of a vessel apparently under sail was seen about four points on the starboard bow. The night was dark, but there was good visibility. The wind was WSW., fresh. The master and mate of said steam tug were in the pilot house, the latter being at the wheel, maintaining a NW. course; a lookout was stationed on her bow, and her lights were properly set and brightly burning. Noting that said vessel was proceeding by the wind on her starboard tack upon a course approximately SSW., crossing that of the said steam tug, the wheel of the latter was ported, with the intent to pass under the stern of said vessel. This change of course gave the approaching vessel a bearing on said steam tug's port bow. While proceeding thus, the other vessel, which as it later appeared was the pilot guard auxiliary *Liberty*, S. P. No. 1229, operated by the Government of the United States of America, now called the *Liberty*, suddenly wore ship before the wind, and showed his green light. Danger whistles were immediately blown on said steam tug, her engines stopped, and reversed, but said guard boat collided with said tug on the latter's port bow about seven or eight feet from her stem.

Third. As a result of said collision the libellant sustained damages in an amount now of approximately eighty-five hundred dollars ($8,500).

Fourth. Said collision and the damages resulting therefrom were caused wholly by the fault of the guard boat *Liberty* and those in charge of her as follows:

1. In not having a competent officer in charge of said vessel.

2. In not having a competent lookout properly stationed and attentive to his duties.

3. In not having a proper helmsman at the wheel of said vessel.

4. In that said guard boat, being the privileged vessel, did not maintain her course and speed.

5. In wearing ship across the bows of said steam tug.

6. In executing a baffling manoeuvre while in close proximity to said steam tug.

7. In other faults to be shown at the trial of the case.

Fifth. The said auxiliary schooner *Liberty* is now lying in the port of Boston and within the admiralty and maritime jurisdiction of this honorable court.

Sixth. That all and singular the premises are true and within the admiralty and maritime jurisdiction of this honorable court.

Wherefore the libellant prays that process in due form of law may issue against the said auxiliary schooner *Liberty*, her engines, boilers, boats, machinery, tackle, apparel, and furniture, and that all persons having or claiming any interest therein may be summoned to appear and answer in the premises and that this honorable court will pronounce for the libellant's damages, and decree that the same may be paid, together with its costs, and for such other and further relief as to right and justice may appertain and as this honorable court is competent to give in the premises.

STAPLES TRANSPORTATION COMPANY,
By C. G. HANNAH, *Pres't.*
BLODGETT, JONES, BURNHAM & BINGHAM,
Proctors.

STATE OF NEW YORK,
County of New York, ss:

C. G. Hannah, being duly sworn, says: I am the president of Staples Transportation Company. I have read the foregoing libel, and the same is true to the best of my knowledge, information, and belief. The sources of my knowledge or information are statements made by employees of the libellant and other persons. The reason why this vertification is not made by the libellant is because it is a corporation.

C. G. HANNAH.

Sworn to before me this — day of January, 1921.

[SEAL.] C. V. BERTSCHE,
Notary Public, Kings Co.

(County clerk's No. 210. Register No. 2195. Certificate filed in NewYork Co. County clerk No. 470. Register No. 2365. Term expires March 30th, 1922.)

On the fourteenth day of February, 1921, the following suggestion of interest was filed by the United States attorney.

SUGGESTION OF INTEREST.

Now comes Daniel J. Gallagher, United States attorney within and for the District of Massachusetts, as proctor for the Government of the United States of America, chartered owner of the auxiliary schooner *Liberty* at the time of the collision stated by the libel filed herein, and appears specially to suggest to the court that at the time of the said collision, December 24, 1917, the auxiliary schooner *Liberty* had been

requisitioned by the Government of the United States upon a bare boat basis by virtue of the authority of the act of Congress of June 15, 1917, and the Executive order of July 11, 1917, issued pursuant thereto, and that thereby the said auxiliary schooner *Liberty* at the time of the happening of said collision was a vessel belonging to the United States; that the United States is interested in said cause, desires the release of the said auxiliary schooner *Liberty* and assumes the liability for the satisfaction of any decree obtained by the libellant in said cause.

DANIEL J. GALLAGHER,
United States Attorney.
By LEWIS GOLDBERG,
Special Asst. U. S. Attorney,
Proctors for the United States.

DISTRICT COURT OF THE UNITED STATES,
District of Massachusetts.

Now comes Lewis Goldberg, special assistant United States attorney for the District of Massachusetts, who being duly sworn according to law, deposes and says that the facts set forth in the foregoing suggestion of interest and plea to jurisdiction are true to the best of his knowledge, information, and belief.

Subscribed and sworn to, before me, this fourteenth day of March, A. D. 1921.

FRANK H. MASON,
Deputy Clerk.

On said fourteenth day of February, 1921, the following suggestion of interest and plea to jurisdiction was filed by the United States attorney.

SUGGESTION OF INTEREST AND PLEA TO JURISDICTION.

Now comes Daniel J. Gallagher, United States attorney within and for the District of Massachusetts, as proctor for the Government of the United States of America, chartered owner of the auxiliary schooner *Liberty* at the time of the collision stated by the libel filed herein, and appears specially to suggest to the court that at the time of the said collision, December 24, 1917, the auxiliary schooner *Liberty* had been requisitioned by the Government of the United States upon a bare-boat basis, a copy of which bare-boat charter is filed herewith and prayed to be taken as part hereof by virtue of the authority of the act of Congress of June 15, 1917, and the Executive order of July 11, 1917, issued pursuant thereto, and that thereby the said auxiliary schooner *Liberty* at the time of the happening of said collision was a vessel belonging to the United States.

That at the time of said collision said auxiliary schooner *Liberty* had been assigned to the Navy Department of the United States and was employed by it as a guard boat in Boston Harbor, then being manned by and through a Navy crew furnished by the Navy Department of the United States; that after said collision the Navy Department released said auxiliary schooner *Liberty* from requisition and cancelled her requisition charter and redelivered the vessel to her owners, and at the time of the filing of the libel herein said auxiliary schooner was employed by her owners in their own service.

Further, it is suggested that as the said auxiliary schooner *Liberty* at the time of said collision was a vessel belonging to the United States and employed in public service for war needs, no liability by reason of said collision was created which survives or becomes enforceable against the said vessel upon her redelivery from public service to her owners as aforesaid; that there is now no collision claim enforceable in rem against the said auxiliary schooner *Liberty*.

Wherefore the United States prays that this court declare that there is no right in libellant herein to maintain said libel in rem against said steamship to recover its collision damages and that the said libel be dismissed with costs.

DANIEL J. GALLAGHER,
United States Attorney,
By LEWIS GOLDBERG,
Special Assistant U. S. Attorney,
Proctors for the United States.

DISTRICT COURT OF THE UNITED STATES,
District of Massachusetts.

Now comes Lewis Goldberg, special assistant United States attorney for the District of Massachusetts, who, being duly sworn according to law, deposes and says that the facts set forth in the foregoing suggestion of interest and plea to jurisdiction are true to the best of his knowledge, information, and belief.

Subscribed and sworn to before me this fourteenth day of March, A. D. 1921.

FRANK H. MASON,
Deputy Clerk.

39926—21——2

LEASE AGREEMENT.

Agreement made this third day of August, 1917, by and between Boston Pilot's Relief Society (the owner) and the United States, represented by the commandant of the naval district, acting under direction of the Secretary of the Navy in pursuance of authority granted by the act of August 29, 1916.

Whereas the Government may, in case of war or national emergency, desire to use the owner's vessel *Liberty No. III* temporarily for naval purposes; and

Whereas the owner and the commandant have agreed on the terms under which said vessel may be so used;

Now, therefore, this agreement witnesseth that,

First. The owner hereby agrees to let and demise his said vessel *Liberty No. III* her engines, boilers, tackle, apparel, and equipment unto the Government to be used in such manner, for such purposes and for such period of time as may in the discretion of the Secretary of the Navy be desirable.

Second. Said vessel shall be delivered to the commandant by the owner, as soon as possible after receipt of notification by the Navy Department to deliver her, with such fuel, stores, and supplies as may be on board at the time, at such place as the commandant may designate.

Third. The fair value of said vessel at the time of delivery shall be determined as follows:

(*a*) By taking the appraised value thereof as fixed by the Board of Appraisal for Merchant and Private Vessels appointed by the Navy Department by order of April 2nd, 1917.

Fourth. The Government shall, in due course, after such delivery, pay to the owner the fair value of the

fuel, stores, and supplies on board said vessel at the time of delivery, as determined by a board to be appointed by the commandant, or as may be agreed on between the parties hereto.

Fifth. The Government shall pay to the owner as charter money for said vessel for the use thereof from the time of her delivery until the return thereof to the owner, a monthly sum

(*c*) One dollar ($1.00) per month, which sum is hereby agreed upon as the charter rate of hire.

Sixth. Said vessel shall be returned to the owner at the place of delivery at a date not later than a reasonab'e time after peace is declared, and thereupon the Government shall pay to the owner a sum equal to the cost to him of restoring the vessel to the same condition and good order in all respects in which she was at the time of delivery to the commandant, ordinary wear and tear excepted, such sum to be determined by (*a*) a board of appraisal to be appointed by the Navy Department, and in addition thereto, when the charter rate of hire is $1.00 per month, a further sum to be determined by said last-mentioned board to reimburse the owner for all depreciation and to fairly indemnify him for the loss of the use of said vessel during the time reasonably needed for repairs, less the value of fuel, stores, and supplies on board at the time of such return.

Seventh. All determinations of the Board of Appraisal or boards of arbitration hereinbefore provided for shall be subject to the approval of the Secretary of the Navy.

Eighth. In case of loss the Government agrees to pay to the owner the value of the vessel at the time of her delivery to the commandant, determined as hereinbefore provided.

Ninth. No member of, or delegate to, Congress shall have any interest in this agreement.

Signed, sealed, and delivered on the day and year first above written.

BOSTON PILOT'S RELIEF SOCIETY.
By JOHN H. LOW, *Pres.*

In presence of:
HORACE W. FOLGER.
S. L. KEY,
Acting Commandant, First Naval District.

On Aug. 28th, 1917, appeared before me John H. Low known to me to be the person who signed the written paper and acknowledged same to be his free act and deed.

WILLIAM C. CHICK,
Notary Public.

L. CLARKE.

On the sixteenth day of February, 1921, it was ordered by the court that "Suggestion of interest" filed in the United States be accepted and the United States be made respondent.

On the same day of February, 1921, the libellant's prayer for warrant of arrest against the *Liberty* was denied by the court and the plea of the United States was adjudged bad with leave to answer.

On the twenty-fourth day of February, 1921, the following motion of libellant that United States be required to answer was filed.

MOTION OF LIBELLANT THAT UNITED STATES BE REQUIRED TO ANSWER.

Now comes the libellant in the above entitled case and moves that the United States of America, admitted on February 16, 1921, as a party respondent

may be ordered to answer the libel within thirty days from the entry of said order of admission and that the case be placed upon the list for trial at the March sitting of the court.

BLODGETT, JONES, BURNHAM & BINGHAM,
Proctors for Libellant.

On the twenty-eighth day of February, 1921, it was ordered by the court that answer be filed by the United States on or before March 18, 1921.

On the eleventh day of March, 1921, the following order of court was entered.

ORDER OF COURT.

MORTON, J.—In the above-entitled cause, it is now, to wit, March 11, 1921, *Ordered*, that pending prohibition proceedings in Supreme Court of the United States raising question of jurisdiction in this District Court, the proceedings in this case are hereby suspended until further order of this court.

District Court of the United States, District of Massachusetts.

I, James S. Allen, clerk of the District Court of the United States for the District of Massachusetts, do hereby certify that the foregoing is a true copy of the record of the District Court up to and including March 11, 1921, in the cause in said District Court depending, entitled "Staples Transportation Company, libellant, *v.* Auxiliary Schooner *Liberty*, and numbered 1936 on the civil docket of said court.

In testimony whereof, I hereunto set my hand, and affix the seal of said court, at Boston, in said district, this sixteenth day of March, A. D. 1921.

[SEAL.] JAMES S. ALLEN, *Clerk.*

No. 1936, Civil. District Court of the United States, District of Massachusetts. Staples Transportation Company *v.* Auxiliary Schooner *Liberty*.

OPINION.

(16 February, 1921.)

MORTON, J. During the war the pilot boat *Liberty*, owned by the Boston Pilots' Relief Society, was turned over to the United States at a nominal rental (one dollar per month), and was manned by a crew from the United States Navy. While so employed she collided with and injured, as is alleged, the libellant's tug *Eureka*. After the close of the war the *Liberty* was returned to her owners and is now in their possession. The facts are as alleged in the "Suggestion of interest" and "Suggestion of interest and plea to jurisdiction" filed by the United States attorney on behalf of the United States.

The owner of the *Eureka* has filed this libel against the *Liberty* to recover damages for said collision. The United States moves to intervene and be substituted as party respondent under section 4 of the act of 9 March, 1920. It also prays that the libel be dismissed upon the ground that as the collision occurred while the *Liberty* was in the possession of the United States and being operated by it, as to which there is no dispute, the libellant is not entitled to proceed against her after her return to private ownership.

The contention of the libellant is that the *Liberty* became liable for damages caused by the collision; that this right could not be enforced against her

while she was a Government vessel because property of the sovereign can not be seized; but that when she ceased to be in the possession of the Government the protection from arrest which she had enjoyed as a Government vessel ended and she became liable to suit in rem. For the Government it is contended in support of the prayer for dismissal of the libel that while the *Liberty* was in the possession of the Government and being operated by it for governmental uses, she was an instrumentality of government against which no right in rem was created by the collision; and that there is therefore nothing on which the present libel can stand.

The question presented has been decided in favor of the libellant's contention by Judge Rose in the *Ceylon Maru*, 266 F. R., 397 (D. Ct. Md.); and there are direct expressions of opinion to the same effect by Judge Mack in the *F. J. Luckenbach*, 267 F. R., 931 (D. Ct. N. Y.), by Judge Learned Hand in the *Gloria*, 267 F. R., 929 (D. Ct. N. Y.), and by Judge Thompson in the *City of Philadelphia*, 263 F. R., 234 (D. Ct. Pa.). This result undoubtedly carries the personification of a vessel to an extreme point, as counsel for the United States suggests; but the alternative view is not free from difficulties.

As the law stands I am of opinion that the facts alleged in the "Suggestion of interest and plea to jurisdiction" do not constitute a defense to the libel.

An order may be entered accepting the "Suggestion of interest" filed by the United States and making the United States the respondent.

The libellant's prayer for a warrant of arrest against the *Liberty* is denied.

The plea of the United States is adjudged bad, with leave to answer.

District Court of the United States, District of Massachusetts.

I, James S. Allen, clerk of the District Court of the United States for the District of Massachusetts, hereby certify that the foregoing is a true copy of the opinion handed down February 16, 1921, in the cause in said District Court depending, entitled "Staples Transportation Company, libellant, *v.* Auxiliary Schooner *Liberty*, and numbered 1936 on the civil docket of said court.

In testimony whereof, I hereunto set my hand, and affix the seal of said court, at Boston, in said district, this twenty-third day of March, A. D. 1921.

[SEAL.] JAMES S. ALLEN, *Clerk.*

MEMORANDUM IN SUPPORT OF APPLICATION.

I.

All the jurisdictional questions here suggested have been fully reviewed in a memorandum, to which we ask leave to refer, filed this day in support of a similar application to this court made by the Government in case No. —, original, entitled "In the matter of the petition of the United States of America, owner of the steamship *Western Maid*." The status of the vessels are different. In the present application, the *Liberty*, then a pilot boat, had been chartered upon the bare boat basis by the Government, pursuant to commandeering powers, and was commissioned as a naval vessel and employed as a dispatch and patrol boat in Boston Harbor during the war period. Such was her status at the time of the collision. At the time the libel was filed, the *Liberty* had been released and redelivered to owners, and then employed by them as a pilot boat. The present application relates to a group of cases, and there are many of them, in which the vessel, privately owned, has been proceeded against by libel in rem, while operating in owner's own service, but to enforce lien liability alleged to have attached to the vessel while under requisition to the Government and then employed by the Government to serve military needs.

II.

It is respectfully submitted that the motion for a writ of prohibition and/or a writ of mandamus should be granted and that a rule should be entered directing the Hon. James M. Morton, jr., Judge of the District Court of the United States for the District of Massachusetts, and the other judges and officers thereof to show cause why the writ of prohibition and/or the writ of mandamus should not issue as prayed for in said petition.

HARRY M. DAUGHERTY,
Attorney General of the United States.
WILLIAM L. FRIERSON,
Solicitor General.
J. FRANK STALEY,
HORACE T. ATKINS,
Special Assistants to the Attorney General.

○

Office Supreme Court, U. S.
FILED
OCT 14 1921
WM. R. STANSBURY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 22 Original.

IN THE MATTER OF

UNITED STATES OF AMERICA, Chartered owner of the Auxiliary Schooner LIBERTY, for a Writ of Prohibition and/or Mandamus, Petitioner,

AGAINST

HON. JAMES M. MORTON, JR., Judge of the District Court of the United States within and for the District of Massachusetts and the officers of said Court.

RETURN.

L. H. LANE, Law Printer, 221 High Street, Boston.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

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IN THE MATTER OF

UNITED STATES OF AMERICA, Chartered owner of the Auxiliary Schooner LIBERTY, for a Writ of Prohibition and/or Mandamus, Petitioner,

AGAINST

HON. JAMES M. MORTON, JR., Judge of the District Court of the United States within and for the District of Massachusetts and the officers of said Court.

RETURN.

I, James M. Morton, Jr., Judge of the District Court of the United States within and for the District of Massachusetts, for and in behalf of myself and the officers of said court, in obedience to the order to show cause herein, issued out of the Supreme Court of the United States on the 11th day of April 1921, on the petition herein, directing me and the officers of said court to show cause why a Writ of Prohibition should not issue against me and the officers of said court, and why a Writ of Mandamus should not issue against me in accordance with the prayer of the petition, hereby appear, certify and make return as follows:—

Answering Sections 1 to 6 inclusive of said petition, the statements therein are true with the exception that this court is not now proceeding to hear and determine the merits of the libel, having by order of March 11, 1921, suspended all proceedings in the case pending action upon the petition.

Answering Section 7 of said petition, it is respectfully submitted that said auxiliary schooner LIBERTY at the time of the issue and execution of process, was not immune from liability, seizure or arrest, or from maritime lien for said collision damages; that it is immaterial that the petitioner has not consented to suit; and that said court has jurisdiction of the subject matter of the suit, had at the time of issuance and execution of process jurisdiction of the res, and by substitution of the petitioner as respondent in lieu of the res, under 41 Stat. 525, has jurisdiction at present, and has properly exercised its judicial powers to proceed, hear and determine said question.

And having fully answered on behalf of myself and the officers of said court, I respectfully submit that said rule should be dismissed and said writs denied, and that we be hence dismissed.

IN WITNESS WHEREOF, I, James M. Morton, Jr., Judge of the District Court of the United States within and for the District of Massachusetts, for and in behalf of myself and the officers of said court, have hereunto set my hand and the seal of said court this sixth day of September, 1921.

JAMES M. MORTON, JR.,
United States District Judge.

[SEAL OF COURT]

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 22 Original.

IN THE MATTER OF

UNITED STATES OF AMERICA, Chartered owner of the Auxiliary Schooner LIBERTY, for a Writ of Prohibition and/or Mandamus, Petitioner,

AGAINST

HON. JAMES M. MORTON, JR., Judge of the District Court of the United States within and for the District of Massachusetts and the officers of said court.

BRIEF IN OPPOSITION TO THE PETITION.

STATEMENT OF THE CASE.

On December 24, 1917, the steam tug EUREKA, owned and operated by Staples Transportation Company, a corporation engaged in towing and transportation, and having a usual place of business in Fall River in the District of Massachusetts, while bound for the port of Boston in said District having in tow a loaded coal barge, was run into by the auxiliary schooner LIBERTY. The LIBERTY was formerly a pilot boat owned by the Boston Pilots Relief Society, but had been chartered by the United States government upon a bare boat form by virtue of an Act of Congress supplemented by an executive order, and at the time of the collision was manned and oper-

ated solely by the United States Navy Department as a guard boat for war service in and about the harbor of Boston. After the Armistice the Navy Department cancelled the charter and redelivered the LIBERTY to her former owners, and she was manned and operated by these owners solely for their own benefit as a pilot boat at the time of the filing of the libel in this case.

Said libel, filed February 5, 1921, by the Staples Transportation Company, owner of the steam tug Eureka, contained a prayer for the usual issuance of process in admiralty *in rem*. Thereupon the United States of America filed, under Sec. 4 of the Act of Congress, approved March 9, 1920 (41 Stat. 525), a suggestion of interest in the litigation, requesting the release of the LIBERTY (apparently under the belief that the vessel had been seized), and assuming all liability for the satisfaction of any decree obtained by the libellant in said cause. After a hearing, orders were made that said suggestion of interest be accepted, that the United States of America be made a party respondent in the action, and that libellant's prayer for warrant of arrest of the LIBERTY be denied.

The United States of America, contemporaneously with this suggestion, filed a further suggestion of interest and plea to the jurisdiction, alleging that by reason of the fact that the LIBERTY at the time of the collision was a vessel belonging to the United States (presumably meaning *pro hac vice*) and was manned and employed by the Navy Department as a guard or dispatch boat in public service for war needs, no maritime lien could arise from the collision, and it was prayed that the libel be dismissed. This plea, after hearing, was adjudged bad, and the prayer for dismissal of the libel was denied.

It is beyond contention that if it be determined that a maritime lien arose out of the circumstances of this case

it is enforceable against the LIBERTY after she has been returned to the possession and control of her private owners. Many decisions have established this principle:

United States v. *Wilder*, 3 Sumner 308
The Siren, 7 Wall. 152
The Davis, 10 Wall. 15
Long v. *The Tampico*, 16 Fed. 491
The Luigi, 230 Fed. 493
The Johnson Lighterage Co. No. 24, 231 Fed. 365
The Attualita, 238 Fed. 909
The Carlo Poma, 259 Fed. 369

The sole question presented for the determination of this Court is whether there arose out of this collision a maritime lien against the LIBERTY, which at said time was manned and operated for naval purposes by the United States Government as owner *pro hac vice*.

ARGUMENT.

I. THE BURDEN OF PROVING IMMUNITY FROM THE LIEN IS UPON THE PETITIONER.

Judge Addison Brown in—

Long v. *The Tampico, supra,*

wherein a claim was made that a steamer against which a libel for salvage was filed was a foreign public vessel exempt from arrest, states at page 500:

> "In claiming exemption from the ordinary process of the court, the burden of proof is clearly upon the claimant to prove, by competent evidence, all the facts necessary to sustain this defence."

II. THE LIBERTY WAS SUBJECT TO A MARITIME LIEN ARISING OUT OF THIS COLLISION.

It is the contention of the respondent that the LIBERTY became subject to a maritime lien in favor of said libellant, irrespective of her character, ownership, employment or possession, and that such a maritime lien constitutes a property right of said libellant in the LIBERTY, *i.e.*, a *jus in re*.

(a) Nature of the Lien.

An early case dealing with maritime liens is

The Bold Buccleugh, 7 Moore, P.C. 267 (1852).

where it was held that a maritime lien arose from a collision of vessels which was enforceable against the offending ship even in the hands of a bona fide purchaser. This case has been a leading case in both England and America ever since. (*The John G. Stevens*, 170 U.S. 113, at 115.) In the same case Chief Justice Jervis said:—

> "A maritime lien does not include or require possession. The word is used in maritime law not in the strict legal sense in which we understand it in courts of common law in which case there could be no lien where there was no possession, actual or constructive. . . . This claim or privilege travels with the thing in whosesoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process, by a proceeding *in rem*, relates back to the period when it first attached."

An early American case expounding this type of lien is

The China, 7 Wall. 53 (1868),

where it was stated that the vessel's responsibility for torts committed by it is not derived from the law of master

and servant or from the common law but from maritime law which impressed a maritime lien upon the vessel in whosesoever hands it might be for torts committed by it, and the vessel was held liable *in rem* for the acts of a compulsory pilot.

In the subsequent case of

Ralli v. *Troop*, 157 U.S. 386,

the Court again referred to its decision in *The China* as follows: —

> "That decision proceeded, not upon any authority or agency of the pilot, or derived from the civil law of master and servant, or from the common law, as the representative of the owners of the ship and cargo: nor upon the law of contribution in general average as between them; but upon a distinct principle of the maritime law, namely, that the vessel, in whosesoever hands she lawfully is, is herself considered as the wrongdoer, liable for the tort, and subject to a maritime lien for the damages. 7 Wall. 68. As said by Mr. Evarts, in his argument for the libellants, 'This theory treats the faults of conduct in the vessel's navigation as imputable to the vessel itself, and discards as immaterial all considerations touching the adjustment among the navigators, or between them and the owners, of the personal fault or personal responsibility of the misgovernment of the vessel'."

The nature of the lien is well stated in

Briggs et al. v. *A Light Boat*, 7 Allen 287,

where the question was whether a maritime supply lien arose and remained after the government took possession from the builder of a light vessel. The Court says:

> "The word lien as applied to ships or vessels has a

> well-settled and fixed meaning in maritime and commercial law. . . . A maritime lien is not a mere right or remedy by which persons entitled to it can enforce a claim or debt due from the owners against their vessels. It is something more than a *jus ad rem*. It is a *jus in re*, — a right in the nature of a title which when enforced and perfected takes effect and transfers the property in the vessel from the time when the lien first attached. If the government becomes the owner of a vessel by purchase, forfeiture or otherwise, it takes a title subject to the same liens for salvage, wages, bottomry and other claims as would attach to it if sold to private persons. *United States* v. *Wilder*, 3 Sumner, 314. *The St. Jago de Cuba*, 9 Wheat. 416. *The Copenhagen*, 1 C. Rob. Adm. 289."

In

The John G. Stevens, 170 U.S. 113 at 120,

this Court states:

> "The foundation of the rule that collision gives to the party injured a *jus in re* in the offending ship is the principle of the maritime law that the ship, by whomsoever owned or navigated, is considered as herself the wrongdoer, liable for the tort, and subject to a maritime lien for the damages."

The origin and development of the personification of the *res* are discussed by Mr. Justice Holmes, in his book on Common Law, pp. 26-34, wherein the author points out:

> "It is only by supposing the ship to have been treated as if endowed with personality, that the arbitrary seeming peculiarities of the maritime law can be made intelligible, and on that supposition they at once become consistent and logical."

Mr. Justice Marshall, in

The Little Charles, 1 Brock. 347, at 354,

which was a case of forfeiture of a vessel under an embargo act, states:

> "This is not a proceeding against the owner; it is a proceeding against the vessel, for an offence committed by the vessel, which is not less an offence, and does not the less subject her to forfeiture, because it was committed without the authority and against the will of the owner."

Mr. Justice Story, in

The Palmyra, 12 Wheat. 1 at 14,

referring to a seizure in a revenue case states:

> "The thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing, and this whether the offence be *malum prohibitum* or *malum in se*. The same principle applies to proceedings *in rem* on seizure in the admiralty."

And in

United States v. *Brig Malek Adhel*, 2 How. 210,

Mr. Justice Story again remarked:

> "It is not an uncommon course in the admiralty, acting under the law of nations, to treat the vessel in which, or by which, or by the master or crew thereof, a wrong or offence has been done, as the offender, without any regard whatsoever to the personal misconduct or the personal responsibility of the owner thereof."

See also:

The John Fraser, 21 How. 184, 194
The Merrimac, 14 Wall. 199
The Clarita and The Clara, 23 Wall. 1
The Barnstable, 181 U.S. 464
The Luigi, *supra*
The Johnson Lighterage Co. No. 24, *supra*

(b) The Lien Arises though the Vessel be Owned, Manned and Operated by a Sovereign for War Purposes.

An early and instructive case is

United States v. *Wilder*, 3 Sumner 308, 28 F.C. No. 16694 (1838),

where the question was whether a general average lien attached to goods belonging to the United States. Mr. Justice Story says:

> "The sole question in the present case is whether there exists a right of lien for the general average due on goods belonging to the United States. . . . There is no doubt that there does exist a lien on all the goods belonging to all the other shippers . . . The question then is whether a like lien exists in regard to goods belonging to the United States . . . There may, for aught I know, be a just foundation for a distinction, as to liens, between the case of the Government and that of a mere private person in many cases of contract. . . . The present case is not one arising under contract; but by operation of law, and if I may so say, in invitum. . . . It is said, that, in cases where the United States are a party, no remedy by suit lies against them for the contribution (in general average); and hence the conclusion is deduced that there can be no remedy *in rem*. Now I confess

> that I should reason altogether from the same premises to the opposite conclusion. The very circumstance that no suit would lie against the United States in its sovereign capacity, would seem to furnish the strongest ground why the remedy in rem should be held to exist. . . . Otherwise there would be no remedy to compel a submission to the authority of any tribunal or justice; and whether the shipowner should ever receive any compensation or not, and what compensation, would depend upon the good will of Congress after, what is a most lamentable defect in the existing state of things, a protracted appeal, and after many years duration of unsuccessful and urgent solicitations to that body. . . . Finding, therefore, no such exemption from the ordinary lien for general average as the Government seeks to sustain, justified by any general principle, or any authority, I am not bold enough to create one."

So also in

The Davis, 10 Wall. 15 (1869),

it was held that cotton owned by the United States government on board a private vessel was subject to a lien for salvage services.

The Siren, 7 Wall. 152 (1868),

refers directly to the question at issue. This case involved the liability of a prize ship in the possession and control of the United States for an injury inflicted in collision with another vessel. Mr. Justice Field states (p. 185):

> "For the damages occasioned by collision of vessels at sea a claim is created against the vessel in fault, in favor of the injured party. This claim may

be enforced in the admiralty by a proceeding *in rem*, except where the vessel is the property of the United States. In such case the claim exists equally as if the vessel belonged to a private citizen, but for reasons of public policy, already stated, cannot be enforced by direct proceedings against the vessel. It stands, in that respect, like a claim against the government, incapable of enforcement without its consent, and unavailable for any purpose."

In

Workman v. *New York City, Mayor, etc.*, 179 U.S. 552,

which was a suit *in personam*, the late Chief Justice, then Mr. Justice White, at pp. 558 and 559, points out the evil consequences from implanting in the maritime law the doctrine that wrong can be done with impunity. In discussing whether a right of action arose against a municipal corporation, he states (p. 566):

"The doctrine above stated (immunity of sovereign from suit) rests not upon the supposed want of power in courts of admiralty to redress a wrong committed by one over whom such courts have adequate jurisdiction, but alone on their inability to give redress in a case where jurisdiction over the person or property cannot be exerted. In other words, the distinction between the two classes of cases is that which exists between the refusal of a court to grant relief because it has no jurisdiction to do so, and the failure of a court to afford redress in a case where the wrong is admitted and jurisdictional authority over the wrongdoer is undoubted."

And at p. 568:

"The fact that a wrong has been committed by a

> public vessel of the crown affords no ground for contending that no liability arises, because of the public nature of the vessel, although it may be, in consequence of a want of jurisdiction over the sovereign, redress cannot be given."

Again, in commenting upon the cases holding that a municipal corporation is not liable for an injury inflicted by its fire department he states (p. 572):

> "All these cases but expound the theory of sovereign attribute, which we have seen does not control the maritime law and cannot justify an admiralty court in refusing to redress a wrong where it has jurisdiction to do so."

And again at p. 573:

> "Of course, as has been repeatedly declared by this court, by the general admiralty law of this country, subject to the exemption from process possessed by the national government, a ship, by whomsoever owned or navigated, is liable for an actionable injury resulting from the negligence of the master and crew of such vessel."

A number of recent District Court cases maintain the principle that a maritime lien arises irrespective of sovereign ownership, possession or use:

In

The Florence H., 248 Fed. 1012,

a vessel belonging to the United States, chartered by it to the French Government and operated by a French crew, was in collision with a British vessel. Judge Learned Hand, sitting in the District Court for the Southern District of New York, stated:

"The remaining question is whether a lien of collision arose against the ship at a time when she was in the possession of the French Republic and in charge of a French crew. This, it seems to me, is concluded by *The Siren*, 7 Wall. 152, 19 L. Ed. 129. The collision there occurred after capture of a prize, but before condemnation, and it was held that a lien arose in accordance with general principles of admiralty law, regardless of the fact that the United States had both title and possession. It is true that the jurisdiction of the court was there held to depend upon the fact that the United States had had recourse to its own courts for condemnation, sale and distribution of the prize money, but the origin of the lien by necessity antedated any such recourse. As a lien *in rem*, if it arose at all, it arose at the time of the collision, and that did not depend in any sense upon the consent of the United States. While it may be urged that at the time of the collision the title was not in the United States, yet by the subsequent condemnation the title so acquired related back to the time of the capture. At least it was so assumed and agreed in the *Manila Prize Cases*, 188 U.S. 254, 263, 23 Sup. Ct. 415, and such is undoubtedly the law. If so, *The Siren*, *supra*, must be taken as necessarily deciding that a lien of collision arises against a vessel when the title and possession are in the United States; and this was the express ground of the opinion.

But it is said that though a lien of collision may arise against a vessel owned by the United States, this cannot result from the negligence of agents of the United States, to say nothing of agents of the French Republic, without violating the rule that a sovereign is not liable for the wrongful acts of its

agents. So far as touches the liability of a vessel of the United States for tortious acts of its agents, the opposite of this contention was in effect settled by *The Siren*, *supra*, which cannot otherwise stand. The same principle applies to *The Athol*, 1 Wm. Rob. 374. In both cases the ships of the sovereign were held *in rem* for collision due to the negligence of their crews. Furthermore, the decision in *Workman* v. *New York*, 179 U.S. 552, 566, 567, 568, 21 Sup. Ct. 212, put an end to any doubt that in admiralty at least the doctrine did not apply. It is of course true that that case involved, not a sovereign, but a municipal corporation, and there might *a priori* be ground for a distinction between such a party and a sovereign; but the court did not make any such. The opinion, on the contrary, went on the theory that in the admiralty the general rule *respondeat superior*, applied without exception. Mr. Justice White *arguendo* referred to *The Siren*, *supra*, and *The Athol*, *supra*, in confirmation of the general applicability of the rule, which could not have been if he had supposed that there was a distinction between corporations, sovereign and municipal.

While this doctrine does not, strictly speaking, reach the case at bar, where the collision occurred through the supposedly wrongful acts of agents of a foreign power, the principle does, upon which it depends, nevertheless, because it is settled in the admiralty that the ship is liable for the tortious acts of any one who lawfully comes in possession of her, and directs her navigation, be he charterer, agent or crew. *The Barnstable*, 181 U.S. 467, 21 Sup. Ct. 684. If *The Florence H.* would have been liable under general principles of maritime law for the negligence of an American crew, it can scarcely be

> supposed that she should not be equally liable for negligence of the crew of any charterer to whom the United States chose to deliver her."

In the above case the vessel was owned by one sovereign and chartered and operated and in the possession of another, and yet the court held that a lien arose from the collision.

Judge Hand re-affirmed his position in

The Gloria, 267 Fed. 929,

which was a collision of said vessel with the steamer Freedom, owned by the United States and a part of the United States Navy, and navigated and manned by officers and a crew of the United States and used solely in the transportation of troops from France to the United States, stating:

> "The cross-libel, though *in rem*, is directed against a vessel which for the present is immune from any possible process of this court, not alone because it is outside the jurisdiction, but because it is a ship owned by and in the possession of the United States. *The Siren*, 7 Wall. 152. It is true that a valid lien has arisen against her if the allegations of the cross-libel be true, and that the lien would survive the transfer of possession by the United States, but for the present the libel hangs in the air. The libellant's motion to declare the ship immune must therefore be granted, if limited to the period of possession by the United States.
>
> The motion to dismiss the cross-libel will be denied. I know of no reason why the cross-libel should be dismissed because the prayer for process cannot at the present time be granted. As I have said, that prayer would be within the power of this court, should

the United States lose possession of the Freedom. This court always has jurisdiction over the subject-matter, however, and may proceed as soon as the arrest becomes legal."

Likewise in

The F. J. Luckenbach, 267 Fed. 931,

Judge Mack in the same court stated:

"Agreeing entirely with the conclusions and the reasoning of Judge Hand in the *Florence H.*, 248 Fed. 1012, and in the decision on motions in Re Steamship Gloria, I hold: . . .

2nd: That while not subject to seizure during its control by the Government, the vessel itself was nevertheless liable *in rem* and subject to a lien therefor, notwithstanding its use as a Government vessel for strictly Governmental purposes at the time of the collision."

In the Eastern District of Pennsylvania, in

The City of Philadelphia, 263 Fed. 234,

Judge Thompson, in holding that a vessel operated by the Railroad Administration was not exempt from a lien for damages caused by her fault, stated, quoting from Mr. Justice Field in

The Siren, supra:

"The doctrine, based upon reasons of public policy, which exempts from seizure a vessel in possession of and operated by the United States for public purposes, does not, however, divest the vessel of the claim or lien of the injured party;"

and further stated:

"As the claim or lien against the vessel existed as soon as the collision occurred, the fact that the United States still continues in possession does not, either under section 10 of the Railroad Control Act or under the doctrine of public policy, forever bar the right of the libelant to mesne process, but merely postpones and holds it in abeyance during the period of that possession. The prohibition of the statute and the reasons of public policy apply only to the immediate application of the remedy and not to the right of action."

In an earlier case,

The Luigi, supra,

Judge Thompson inferentially took the same position. The Luigi was requisitioned by the Italian Government, and was in Philadelphia to take a cargo for the Italian Government when seized. Her master gave a claim and stipulation in the name of her private owners. It was held that though the vessel could not be seized while in the possession of the Italian Government yet now that she was released and bond given, the court could proceed to enforce the lien. This implies that a lien must have arisen during the requisitioned ownership and possession of the Italian Government.

And in

The Western Maid (Unreported, Eastern Dist. of Penn.),

where the vessel was manned and operated by the United States Navy at the time of the collision and upon return to the United States Shipping Board was arrested in enforcement of the lien arising out of the collision, Judge Thompson held that the court had jurisdiction to enforce the collision lien.

This same question has also arisen in the Maryland District in

The Ceylon Maru, 266 Fed. 396

The offending vessel was a United States vessel manned by a naval crew and engaged at the time of the collision in the transportation of military supplies to the army in France. The same contention was there made as is made in the present case,—that no maritime lien arose. Judge Rose, after briefly reviewing the *Workman* case, stated:

> "The public nature of the service upon which the vessel was engaged at the time of the commission of the tort affords no immunity from liability in admiralty. . . . The language of the Supreme Court is so clear that it does not seem that it is open to two constructions."

And in

The Carolinian, 270 Fed. 1011,

which is a case of collision with a vessel requisitioned by the United States on a bare boat charter, manned by an army crew, used as an army transport, and (like the LIBERTY in the present case) returned before the arrest to her private owner, Judge Rose reaffirmed his opinion that a maritime lien arose and was enforceable when the vessel was in the possession of a party other than a sovereign.

We have therefore within a period of a few years, decisions from four districts, from Massachusetts to Maryland, taking a uniform view that a maritime lien arises irrespective of the ownership, possession or use of the vessel. No recent cases are contra. These cases follow the direction pointed out in the decisions of this Court, and produce that uniformity in the maritime law which the late Chief Justice White in the *Workman* case points out as being so desirable.

(c) The Property of a Sovereign is Not Immune from Pre-existing Maritime Liens.

In

Briggs et al v. *A Light Boat, supra,*

the Court, citing

United States v. *Wilder, supra,*
St. Jago de Cuba, 9 Wheat. 416, and
The Copenhagen, 1 C. Rob. Adm. 289,

says:

> "If the government becomes the owner of a vessel by purchase forfeiture or otherwise, it takes a title subject to the same liens for salvage, wages, bottomry and other claims as would attach to it if sold to private persons."

The same reasons would exist for the cancellation of pre-existing liens as for the prohibition of the creation of liens, and yet the government has always accepted title to property acquired by it with the liens attached, and has never raised any question of its immunity therefrom.

(d) The Petitioner has Assumed the Creation and Existence of a Lien as Against a Lesser Sovereign.

In

Oyster Police Steamers of Maryland, 31 Fed. 763,

a steamer owned and operated by the sovereign State of Maryland had violated the rules of the United States Local Inspectors of steam vessels. The United States government held the steamer subject to the lien penalties the same as though privately owned and operated. It is, we submit, inequitable for a sovereign to assume a lien to exist as against the property of another sovereign while denying a similar privilege against itself.

(e) The Petitioner by Act of March 9, 1920 (41 Stat. 525), has Impliedly Admitted that a Lien may be Created Upon Vessels Owned and/or Operated by it.

This Act aims to relieve the government from the inconvenience and embarrassment attendant upon physical seizure of its commercially operated vessels, forbids all seizure of its vessels within its jurisdiction, provides for relief of its vessels sei ed in foreign ports and for release of vessels seized in the possession of other parties upon claims originating during government operation, the latter apparently irrespective of the character of the use in which the vessel is engaged. The Act neither expressly nor by implication denies the creation of a maritime lien upon a government vessel. On the other hand it impliedly assumes that such a lien may be created.

Congress could easily have forbidden in Sec. 1 of the Act, had it so intended, the creation of a lien as well as the seizure of the vessel. Instead, however, it specifically permits suit to be prosecuted upon the theory *in rem* (Sec. 3); it provides for the release of vessels seized in foreign ports in the enforcement of maritime liens (Sec. 7), and in Sec. 4, under which the United States government has intervened in the present case, it provides for the release of a vessel seized in private hands upon a claim having its origin under government operation. This section assumes that a lien had been created during the government possession, ownership or operation, and that the vessel had been seized in the enforcement thereof. This latter section is not confined to vessels used commercially.

If the petitioner's contention is correct that no lien can be created by the government vessel, then Sec. 4 has no reason for its existence. The petitioner by adopting this

section in its suggestion accepts the respondent's theory of the case.

III. ENGLISH CASES DISTINGUISHED.

In England, immunity attaches to all property owned by the crown, irrespective of whether or not it is in possession of the sovereign.

The Broadmayne, L.R. (1916), P.D. 64
The Scotia (1903), L. A. C. 501

The above rule, which taken literally appears harsh, is more rigorous in theory than in practice, for in England the Lords Commissioners of the Admiralty represent the crown, and have a discretionary power freely exercised, to waive the privileges of the crown and consent to jurisdiction.

The Fidelity, 16 Blatch. 569, F.C. 4758
U.S. v. *N.Y. Oriental S.S. Co.*, 216 Fed. 61, 67
Thomson Nav. Co. v. *City of Chicago*, 79 Fed. 984

In

The Siren, supra,

this Court said (page 155):

> "In England, when the damage is inflicted by a vessel belonging to the crown, it was formerly held that the remedy must be sought against the officer in command of the offending ship. But the present practice is to file a libel *in rem*, upon which the court directs the registrar to write to the lords of the admiralty requesting an appearance on behalf of the crown—which is generally given—when the subsequent proceedings to decree are conducted as in other cases."

And in

The Davis, supra,

this Court points out that by reason of the difference in the essential character of the two governments, the English rule in practice prevents gross injustice being done. The Court says:

> "The liberal exercise of its authority removes the difficulty presented here, where no power to do this exists in any officer of the Government, and prevents any apprehension of gross injustice in such cases in England."

As the Court points out in the above case, in the United States no power exists in any officer of the federal government to confer jurisdiction over the subject matter upon any of the federal courts. (See also *United States* v. *N. Y. & Oriental S. S. Co., supra.*)

The situation to which Judge Story refers in

United States v. *Wilder, supra,*

that:

> "Whether the ship-owner should ever receive any compensation or not, and what compensation, would depend upon the good will of Congress after, what is a most lamentable defect in the existing state of things, a protracted appeal, and after many years duration of unsuccessful and urgent solicitations to that body"—

is as true today as it was in 1838.

If, therefore, the courts of this country should follow the English rule as to immunity from lien of property belonging to the sovereign, we should feel here the rigor of the rule without the alleviation of the liberal English practice referred to above. As this court said, speaking through Mr. Justice Miller, in

United States v. *Lee*, 163 U.S. 196, at 208:

> "But little weight can be given to the decisions of the English courts on this branch of the subject. . . ."

and in

Homer Ramsdell Co. v. *Comp. Gen. Trans.*, 182 U. S. 406,

where, after referring to some English authorities, Mr. Justice Gray said:

> "There is no occasion to refer further to the English cases in admiralty, because in England it is held that the ship is not responsible in admiralty where the owner would not be at common law, differing in this respect from our own decisions."

Furthermore, the personification of the *res* is not carried so far in England as in the United States. In the former the procedure *in rem* is used merely as a means to compel the appearance of the respondent, and judgment runs against the individual, — the seizure of the *res* is incidental.

The Parlement Belge, 5 P. D. 197

IV. THE AUTHORITIES DO NOT UPHOLD THE CONTENTION OF THE PETITIONER THAT NO MARITIME LIEN AROSE FROM THE COLLISION.

The Government cites in support of its petition

Kawananakoa v. *Polyblank*, 205 U.S. 349 at 353
The Fidelity, 8 Fed. Cas. No. 4758
The Parlement Belge, 4 Asp. M.C. at 234 and 241
The Prins Frederik, 2 Dod. 451
Board of Commissioners v. *O'Conner*, 86 Ind. 531, 537
Rowley v. *Conklin*, 89 Minn. 172 at 175
Briggs v. *Light Boat*, 7 Allen 287, at 297

Of these cases that of *Kawananakoa* v. *Polyblank* is a decision on the general principle of immunity of a sovereign from a suit *in personam*, and is undoubtedly well settled law.

The Parlement Belge is a case of a Belgian mail packet owned and in the possession of the king of Belgium. The court holds that the sovereign cannot be sued nor his property attached, and in a review of the authorities discusses whether a maritime lien attaches. It intimates in *obiter dicta* that a lien would not arise, but this is not decided, in fact is not material; for under the facts of this case the boat was at the time of the service of process and in all previous times, owned and in the possession of the sovereign, and the court merely held that she could not be seized, and that would also be the well-settled American view. The intimations in the case relative to a maritime lien should be considered in connection with the English practice, which, as before stated, is harsh in theory, but is alleviated in practice by a policy of submission to jurisdiction which is foreign to our system of government.

The Prins Frederik was a claim of salvage against a ship of war of Holland for services performed by the British brig Howe. To be sure, as stated in the petitioner's brief, the king's advocate argued that the Prins Frederik was immune in a civil suit by individuals the same as if she were a ship of war belonging to the British government; *but its brief neglects to state that the court apparently ignored this argument and allowed a recovery of £800.*

Board of Commissioners v. *O'Conner* is the case of a mechanic's lien in the construction of a county court house.

Rowley v. *Conklin* is another case of a state statutory lien in which it was held that no laborer's lien arose for work on logs belonging to the state.

In *Briggs et al.* v. *A Light Boat*, under a contract to

build light vessels for the United States in which no title passed until completion and delivery, it not only was held that a lien arose for supplies furnished, but the court further held that when the boat was turned over to the government the government took it subject to the lien.

The petitioner therefore cites only three cases holding that no lien is created. Two are State decisions of Indiana and Minnesota, which have reference solely to statute mechanic's liens which are enforced in the common law courts, and are not analogous to maritime liens; the third is *The Fidelity*. In that case a libel was filed by the owner of a canal boat *in rem* against the tug Fidelity to recover damages for the stranding and sinking of the canal boat through the alleged negligence of the tug. The latter was seized under process. The Municipal Corporation of New York entered a claim as owner of the tug. The latter was engaged solely in the business of the municipal corporation Blatchford, J., held, 9 Ben. 333, F.C. 4757, that on the ground of public policy the tug could not be seized while so used, stating:

> "A lien may exist and the court where it has control of the res in a proper manner may enforce the lien upon it, but it will not enforce the lien upon the res where in order to obtain such control and sustain the proceeding the possession of the governmental authority must be invaded under the process of the court. The latter is the present case."

The case was appealed (See 16 Blatch. 569, F.C. 4758), and Mr. Chief Justice Waite held that the tug was not liable, intimating that no maritime lien upon the vessel could arise from the negligent acts of the vessel while being operated by the government, but Mr. Chief Justice Waite was deciding a case where a tugboat at the time of the seizure was not only owned by a

municipal corporation but was actually in use by its Commissioners of Public Charities and Correction in transporting prisoners, carrying sick persons, etc. His decision is undoubtedly correct, that the tug should not be seized while in the possession of the municipal corporation and so used. It is contra to Judge Blatchford, and *obiter dicta* for Mr. Chief Justice Waite to say that no maritime lien could arise. It was sufficient for him to have held that no lien could be enforced. Furthermore, Mr. Chief Justice Waite seems to have reached his conclusion from the analogy of State mechanic's liens and on the theory that public property devoted to public uses was exempt from seizure and sale under execution. It seems, however, that public property is well protected by the rule that it cannot be seized in the enforcement of a lien and that it is unnecessary to go to the extreme of denying the lien. The views of Mr. Chief Justice Waite were at the time contrary to those of this Court, and have since been expressly repudiated by this Court in

> *Workman* v. *New York City, Mayor, etc.*, 179 U.S. 552,

wherein Mr. Justice White, referring to *The Fidelity*, states:

> "True also, where admiralty process has been set in motion against a municipal corporation, public policy, it has been held, restrains a seizure of property used for public purposes by such corporation. *The Fidelity*, 16 Blatchf. 569, Fed. Cas. No. 4758. This conclusion, however, is but the application of the exception as to the mode of execution of a judgment or decree against such a corporation, to which we have referred, and its existence in the admiralty law in all cases has also been denied. *The Oyster Police Steamers of Maryland*, 31 Fed. Rep. 763. Which

> of these conflicting conclusions, as to the exception in question is correct we are not called upon on the present record to determine, since no levy of process upon the fire-boat was made or attempted to be made."

The Court then proceeds to adopt the theory, as heretofore quoted, that the lien arises irrespective of public ownership and control; and Judge Rose, referring to both of these cases says in

The Ceylon Maru, 266 Fed. 396:

> "On her behalf it is now argued that no liability *in rem* ever attaches to a ship belonging to the government for anything she does while in its public service. What Chief Justice Waite said, while on circuit, in *The Fidelity*, 8 Fed. Cas. 1189, No. 4,758, fully sustains this contention. But the Supreme Court in *Workman* v. *New York City*, 179 U.S. 552, 21 Sup. Ct. 212, 45 L. Ed. 314, explained that what was decided in that case was merely the application of the exception to the mode of execution of a judgment or decree against a municipal corporation, and then went on to say that in the admiralty law the existence of that exception in all cases had been denied, citing a case from this district. *Oyster Police Steamers of Md.* (D.C.) 31 Fed. 763."

And he repeats these statements in

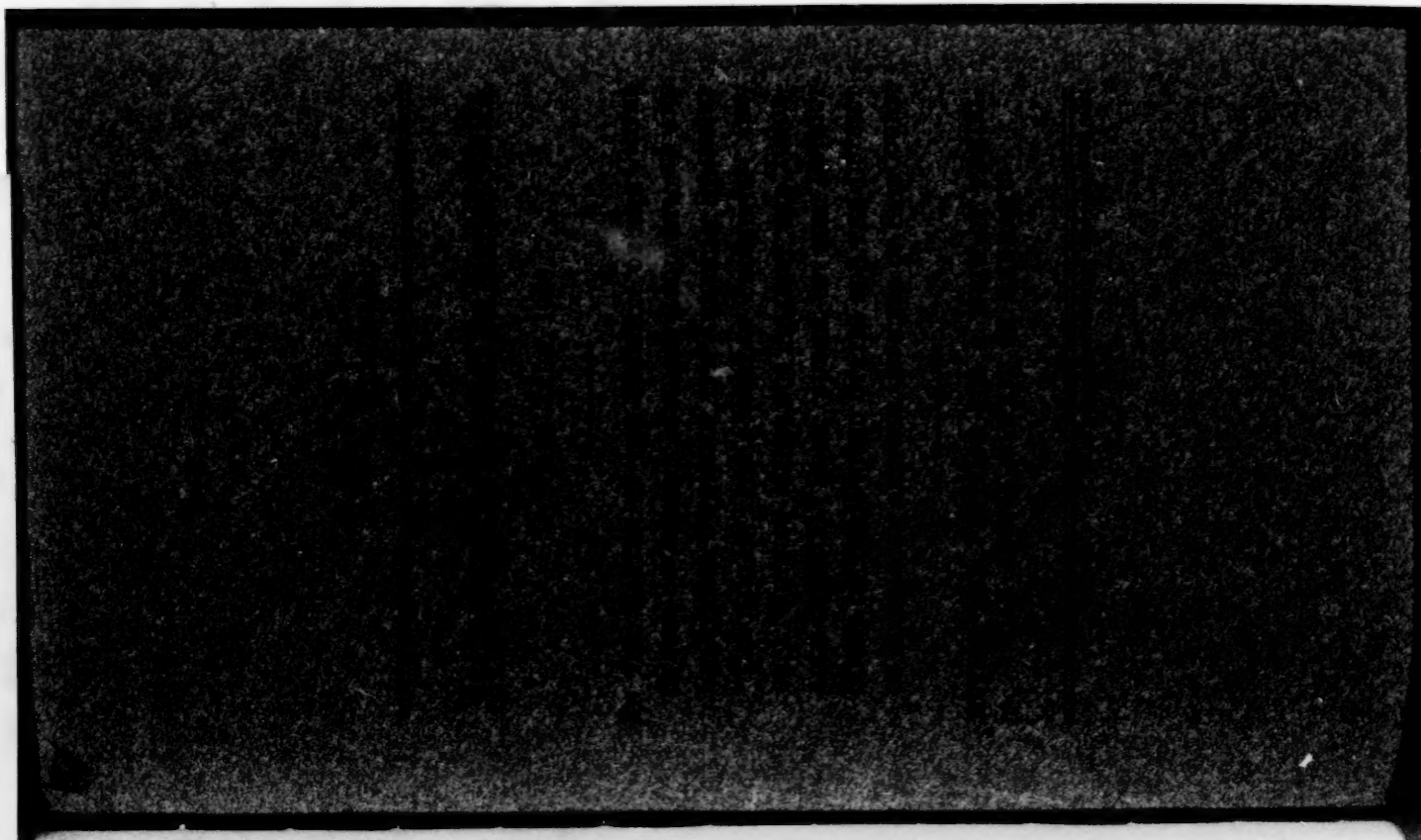
The Carolinian, 270 Fed. 1011

It is seen therefore that the *obiter dicta* in *The Fidelity*, upon which the case of the Government rests, has not only not been accepted, but has been expressly repudiated by this Court.

CONCLUSION.

The respondent therefore respectfully submits that the well established principles of *in rem* procedure be allowed to remain unchanged, and that in the present case it be determined that out of said collision between the tug EUREKA and the auxiliary schooner LIBERTY there arose a property right, *i. e.*, a maritime lien, which attached to the LIBERTY in favor of the owner of the EUREKA; that this right was suspended in its enforcement while the LIBERTY was in the possession of the United States government, but became enforceable when the LIBERTY was re-delivered to the hands of her former owners; and that thereafter said auxiliary schooner LIBERTY was subject to seizure and arrest. The respondent respectfully submits that the rule should be discharged and the writs denied.

EDWARD E. BLODGETT,
FOYE M. MURPHY,
Proctors for Respondent.



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In the Supreme Court of the United States.

OCTOBER TERM, 1920.

No. ———. ORIGINAL.

IN THE MATTER OF THE PETITION OF THE UNITED STATES OF AMERICA, FORMER REQUISITIONED AND CHARTERED OWNER OF THE AMERICAN STEAMSHIP "CAROLINIAN."

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF PROHIBITION AND/OR A WRIT OF MANDAMUS.

And now comes Harry M. Daugherty, Attorney General of the United States of America, former requisitioned and chartered owner of the steamship *Carolinian* and moves:

1. For leave to file the petition for a writ of prohibition and/or a writ of mandamus, hereto annexed, and

2. That a rule be entered and issued directing the District Court of the United States for the District of Maryland and the Honorable John C. Rose, judge thereof, and the officers of said court to show cause why a writ of prohibition and/or a writ of mandamus should not issue against them and each of them, in accordance with the prayer of said peti-

tion, and why the United States of America should not have such other and further relief therein as may be just.

HARRY M. DAUGHERTY,
Attorney General of the United States,
For the Petitioner.

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

NO. ——. ORIGINAL.

IN THE MATTER OF THE PETITION OF THE UNITED STATES OF AMERICA, FORMER REQUISITIONED AND CHARTERED OWNER OF THE AMERICAN STEAMSHIP "CAROLINIAN," FOR A WRIT OF PROHIBITION AND/OR A WRIT OF MANDAMUS, AGAINST THE HONORABLE JOHN C. ROSE, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND, AND THE OFFICERS OF SAID COURT.

PETITION FOR A WRIT OF PROHIBITION AND/OR A WRIT OF MANDAMUS.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Harry M. Daugherty, Attorney General of the United States, on behalf of the United States of America, former requisitioned and chartered owner of the American steamship *Carolinian*, against the Honorable John C. Rose, judge of the District Court of the United States for the District of Maryland, sitting in admiralty, and against the officers of said court, respectfully represents:

First. That on July 9, 1920, F. E. Richards, as liquidator of the Steamship Treganna Company (Ltd.) owner of the British steamer *Mavisbrook*, filed a libel in the District Court of the United States for the District of Maryland, against the American steamship *Carolinian*, to recover damages in the sum of $20,000, alleged to have been sustained as a result of a collision between the *Mavisbrook* and the *Carolinian*, on the 15th day of February, 1918, in the harbor of Brest, France, and prayed that process issue for the seizure, arrest, and attachment of the said steamship, according to the course and practice of said court, and that said vessel be condemned and sold to pay said collision damages. A copy of the libel, as part of the record of proceedings in said court, is hereto annexed.

Second. That theretofore the steamship *Carolinian* had been requisitioned by the United States, upon the bare boat basis, under and by virtue of the authority of the emergency shipping legislation, Act of Congress June 15, 1917 (39 Stat. 728, 730), and was a vessel belonging to the United States. That at the time of the collision, the United States commissioned her as an Army cargo transport and employed her to serve military needs in war service. That, subsequently, the *Carolinian* was released from requisition and redelivered to her owners, who then employed her in merchant service, in which service the steamship was engaged at the time of the filing of the said libel and her attachment thereunder.

Third. That thereafter, by virtue of the authority of section 4 of the act of Congress entitled "Suits in

admiralty act," approved March 9, 1920 (41 Stat. 525), the United States filed its suggestion that it was interested in such proceedings, desired the immediate release of the steamship *Carolinian* from arrest or attachment without bond or stipulation, and that it assumed the liability for the satisfaction of any decree entered therein. Thereupon the said district court directed the release of the said steamship from attachment without bond or stipulation.

Fourth. That thereafter, Robert R. Carman, the United States attorney for the District of Maryland, specially appearing on behalf of the United States for the purpose of questioning the jurisdiction of said court to proceed in said cause, filed of record suggestions that inasmuch as the *Carolinian*, at the time of the collision, was a vessel belonging to the United States, employed by its War Department as an Army transport to serve military needs, she was immune from liability or lien for collision damages, and the court was without jurisdiction to proceed against the vessel or to hear and determine the matters alleged in said libel. Copy of said suggestion, as part of the record of proceedings in said court, is hereto annexed.

Fifth. That thereafter the matter came on for hearing before the Honorable John C. Rose, judge of said court, upon the right of said court to assume jurisdiction or otherwise to hear and determine the matters alleged in said libel, who handed down an opinion in which, while finding the *Carolinian* at the time of

the collision was a vessel belonging to the United States and employed as an Army cargo transport to serve military needs, nevertheless overruled the Government's suggestion and assumed jurisdiction, and is proceeding to hear and determine the merits of the libel. Copy of said opinion, as part of the record of proceedings in said court, is hereto annexed.

Sixth. That a certified copy of the record of proceedings in said District Court of the United States for the District of Maryland, filed in the said cause, is hereto annexed and made a part hereof.

Seventh. That it is now represented that inasmuch as at the time of the collision the *Carolinian* was a commissioned Army transport employed by this sovereign petitioner to serve military needs, she was immune from liability or lien for said collision damages. Further, that said libel proceedings, in substance and effect, is an action against your sovereign petitioner and presents a claim for tort arising out of a collision alleged to have resulted from the incompetence or want of skill of Army officers commissioned to man and operate an Army transport, and that for the liability of such losses this sovereign petitioner has not consented to suit. By reason thereof the said District Court was, and is, without jurisdiction to proceed to hear and determine the matters alleged in said libel in rem filed against said steamship.

Wherefore the said Harry M. Daugherty, Attorney General of the United States, the aid of this honorable court, respectfully requesting, prays—

1. That a writ of prohibition may isssue out of this honorable court to the said Honorable John C. Rose, judge of the United States District Court for the District of Maryland and/or the officers of said court, prohibiting him and them from taking any step whatsoever in the cause aforesaid, and, generally, from the further exercise of jurisdiction therein or the enforcing of any order, judgment, or decree made under color thereof.

2. That a writ of mandamus be issued out of and from this honorable court directing and commanding the Honorable John C. Rose, judge of the District Court of Maryland to vacate the order so entered by him overruling the Government's exception to jurisdiction, and to enter an order in said cause declaring the said steamship *Carolinian* immune from liability or lien for said collision damages.

3. That the court grant to the United States of America such other and further relief as may be just in the premises.

HARRY M. DAUGHERTY,
Attorney General of the United States of America.

I have read the foregoing petition by me subscribed, and the facts therein stated are true to the best of my information and belief.

HARRY M. DAUGHERTY.

Subscribed and sworn to before me this 25th day of March, 1921.

JULIA B. RISHEL,
(Seal.) *Notary Public, District of Columbia.*

TRANSCRIPT OF RECORD IN THE DISTRICT COURT.

LIBEL.

UNITED STATES OF AMERICA,

District of Maryland, to wit:

At a District Court of the United States for the District of Maryland, begun and held at the city of Baltimore on the first Tuesday in March (being the first day of the same month), in the year of our Lord 1921.

Present: The honorable John C. Rose, judge, Maryland district; Robert R. Carman, Esq., attorney; William W. Stockham, marshal; Arthur L. Spamer, clerk.

Among other proceedings were the following, to wit:

F. E. Richards *v.* Steamer *Carolinian*, libel in a cause of collision, civil and maritime. No. 656 Admiralty Docket.

Filed 9 July, 1920.

To the honorable the judges of the United States District Court for the District of Maryland:

The libel of F. E. Richards as liquidator of Steamship Tregenna Co. (Ltd.), owner of the steamer *Mavisbrook* against the steamer *Carolinian*, her engines, boilers, etc., and against all persons lawfully intervening for their interests therein, in a cause of collision, civil and maritime, alleges upon information and belief as follows:

First. At all the times herein mentioned the Steamship Tregenna Co. (Ltd.) was and still is a company

of limited liability organized under the Kingdom of Great Britain, and the owner of the steamer *Mavisbrook;* that said company is now in liquidation and that your libelant is the duly appointed and authorized liquidator thereof, with authority to prosecute and collect all outstanding claims thereof.

Second. On the 15th day of February, 1918, the said steamer *Mavisbrook* was lying properly anchored in the harbor of Brest, France, being laden with a cargo of lumber and about to sail from that port to Bordeaux. The steamer *Carolinian* was moving about in the said harbor, and while the *Mavisbrook* was lying properly anchored as aforesaid, the steamer *Carolinian* ran into and collided with the *Mavisbrook* striking her with the *Carolinian's* stem on the port side of the *Mavisbrook* abreast her main rigging.

Third. The said collision was not due to any fault or neglect on the part of the steamer *Mavisbrook* or those in charge of her, but was due solely to the fault and negligence of the steamer *Carolinian* and those in charge of her, in the following particulars, among others, which will be pointed out at the trial:

1. In that she failed to keep a proper lookout;
2. In that she was not in charge of competent persons;
3. In that she unnecessarily navigated across the anchorage grounds;
4. In that as the moving vessel she failed to keep clear of the *Mavisbrook* which was lying at anchor;
5. In that she tried to pass too close to the *Mavisbrook* and failed to allow for the effect of tides, winds, and currents;
6. In that she failed to steer herself aright or to reverse her engines at the proper

time, or to take any other due or adequate means to avoid the collision.

Fourth. By reason of the premises the steamer *Mavisbrook* and her owners sustained damage, as nearly as the same can be estimated at present, of about $20,000, no part of which has been paid, although duly demanded.

Fifth. The steamer *Carolinian* is now, or soon will be, within the port of Baltimore and within the jurisdiction of the United States and of this honorable court.

Wherefore, the libelant prays that process in due form of law in accordance with the practice of this court in cases of admiralty and maritime jurisdiction may issue against the steamer *Carolinian*, her engines, boilers, etc., and that all persons having or claiming any interest therein be cited to appear and answer the matters aforesaid, and that the libelant may have a decree for the damages sustained by it as aforesaid, together with interest and costs, and that the steamer *Carolinian*, her engines, boilers, etc., may be condemned and sold to pay the same, and that the libelant may have such other and further relief as may be just.

HAIGHT, SANDFORD, SMITH AND GRIFFIN,
BROWN, MARSHALL, BRUNE AND PARKER,
Proctors for Libellant.

STATE OF MARYLAND, *City of Baltimore, to wit:*

W. Ainsworth Parker, being duly sworn, deposes and says: That he is one of the proctors for the libelant; that he is authorized to make this affidavit; that he has read the foregoing libel; that to the best of his knowledge, information, and belief all statements thereof are true; that he acquired such knowl-

edge of the facts therein set forth from statements of libelant, its agents and servants; that the libelant is not now in the United States.

W. AINSWORTH PARKER.

Subscribed and sworn to before me this 9th day of July, 1920.

[SEAL.] ADDIE B. DEERING,
Notary Public.

SUGGESTION OF UNITED STATES FOR RELEASE OF VESSEL.

Filed July 21, 1920.

In the District Court of the United States for the District of Maryland, in Admiralty. F. E. Richards, as liquidator of the steamship Tregenna Co. (Ltd.), owner of the steamship *Mavisbrook* *v.* steamship *Carolinian.*

To the honorable, the judge of said court:

The United States suggests to the above-named court that the steamship *Carolinian* is a privately owned vessel not in the possession of the United States or of any corporation in which the United States or its representatives owns the entire outstanding capital stock; and that said steamship *Carolinian* has been arrested or attached upon a cause of action alleged to have arisen from previous possession, ownership, or operation of said steamship by the United States or by such corporation.

The United States further suggests that it is interested in the above-entitled cause; that it desires the immediate release of said steamship *Carolinian* from said arrest or attachment without bond or stipulation therefor; and that the United States assumes the liability for the satisfaction of any decree ob-

tained by the above-named libellants in the above-entitled cause.

By direction of the Attorney General of the United States.

ROBERT R. CARMAN,
United States Attorney.

Upon the foregoing suggestion, it is ordered this 21st day of July, 1920, that the steamship *Carolinian* be and the same is hereby released.

JOHN C. ROSE,
District Judge.

SUGGESTION OF UNITED STATES FOR DISMISSAL OF LIBEL.

Filed 6 January, 1921.

In the District Court of the United States for the District of Maryland, in Admiralty. F. E. Richards, as liquidator of the Steamship Tregenna Co. (Ltd.), owner of the steamship *Mavisbrook*, *v.* steamship *Carolinian*.

Now comes Robert R. Carman, United States attorney for the district of Maryland, as proctor for the Government of the United States of America, chartered owner of the steamship *Carolinian*, at the time of the collision stated by the libel filed herein, and appears specially to suggest to the court that, at the time of the said collision, February 15, 1918, the steamship *Carolinian* had been requisitioned by the Government of the United States, upon the bare-boat basis, copy of which bare-boat charter is filed herewith and prayed to be taken as part hereof, by virtue of the authority of the act of Congress of June 15, 1917, and the executive order of July 11, 1917, issued pursuant thereto, and that thereby the said steamship *Carolinian*, at the time of the happening of

said collision, was a vessel belonging to the United States.

That at the time of said collision, said steamship *Carolinian* had been assigned to the War Department of the United States and was employed by it as an Army transport, then being manned by and through an Army crew furnished by the War Department of the United States. That after said collision the War Department released said steamship from requisition and canceled her requisition charter and redelivered the vessel to her owners, and at the time of the filing of the libel herein said steamship was employed by her owners in their own service.

Further, it is suggested that as the said steamship *Carolinian* at the time of said collision was a vessel belonging to the United States and employed in public service for war needs, no liability by reason of said collision was created which survives or becomes enforcible against the said vessel upon her redelivery from public service to her owners, as aforesaid. That there is now no collision claim enforcible in rem against the said steampship *Carolinian*.

Wherefore the United States prays that this court declare that there is no right in the libellant herein to maintain said libel in rem against said steamship to recover its collision damages, and that the said libel be dismissed with costs.

ROBT. R. CARMAN,
United States Attorney.

UNITED STATES OF AMERICA,
District of Maryland, to wit.

Now comes Robert R. Carman, United States attorney for the District of Maryland, who being duly sworn according to law, deposes and says that the

facts set forth in the foregoing answer are true to the best of his knowledge, information, and belief.

Subscribed and sworn to before me this 6th day of January, 1921.

CHAS. W. ZIMMERMANN,
Chief Deputy Clerk of the District Court of the United States for the District of Maryland.

REQUISITION CHARTER.

[United States of America. U. S. S. B. Charter, Form No. 2.]

Name of steamship: *Carolinian.*

Type of steamship: Cargo.

D. W. tonnage: 6,975, subject to correction.

Gross tonnage: 4,170.

Passenger capacity: None.

Knots per hour: Average 9.

Date on which vessel entered into pay: August 23, 1917, 12 noon.

This requisition charter made and concluded upon in the District of Columbia the 28th day of December, 19—, between Garland Steamship Corporation, of ———, of New York, owner of the good American single-screw steamship *Carolinian*, of New York, of 4,170 tons gross register and 2,707 tons net register, built in West Hartlepool, England, having engines of 325 nominal horsepower, provided with proper certificate for hull and machinery, and classed 100 A–1 at British Lloyds, of about 348,319 cubic feet capacity and 6,975 sub. to correction tons dead-weight capacity, summer freeboard, inclusive of permanent bunkers, capable of making an average voyage speed when loaded of 9 knots an hour, under ordinary conditions, on a consumption of about 27 tons of coal, or about ——— barrels of oil, per 24 hours; and the United States of America, through the United States Shipping Board—

Witnesseth:

Whereas by requisition order, dated August 22, 1917, pursuant to the urgent deficiency act of June 15, 1917, and the President's Executive order of July 11, 1917, the United States has requisitioned the use of the steamship *Carolinian*,

and the steamship has been delivered into possession of the United States pursuant to the requisition; and

Whereas it is desired by the United States and by the owner to fix the compensation (hereinafter called hire) which the United States shall pay to the owner for use of the steamship so requisitioned, and to define by agreement the rights and duties of the United States and of the owner with respect to the operation of the vessel under the requisition, and with respect to other matters in connection therewith:

Now, therefore, it is agreed as follows:

First. The terms and conditions under which the vessel is to be operated shall be those contained in the "Time Form" hereto annexed; provided, however, that at the time of the requisition or at any time thereafter, on five days' written notice, the United States may operate the vessel under the terms and conditions contained in the bare-boat form hereto annexed, such operation to begin when the steamship is in a United States port.

Second. In consideration of the compensation provided and the other obligations assumed by the United States hereunder, the owner accepts this requisition charter in full satisfaction of any and all claims he has or may have against the United States arising out of the requisition and accepts the compensation herein provided for as the just compensation requiaed by law; provided, however, that the acceptance of this requisition charter shall be without prejudice to the claim, if any, the owner may have against the United States arising out of recoveries against the owner by third parties on the vessel's commitments.

Third. Upon giving five days' written notice to the owner the United States may at any time, when the vessel is in a United States port, cancel this requisition charter without prejudice to the accrued rights of either party.

GARLAND STEAMSHIP CORPORATION, *Owner.*
By G. G. ALLEN.

THE UNITED STATES SHIPPING BOARD,
By E. F. CARRY.

Witness the signature of—
(Sgd.) [Illegible.]
Witness to the signature of—
(Sgd.) [Illegible.]

TIME FORM.

Whereas the United States has determined to deliver possession of the vessel to the owner to be operated by the owner for the United States;

Now, therefore, it is agreed as follows:

PERIOD OF SERVICE—VESSEL TO BE COMPLETELY EQUIPPED AND FIT—MAKING GOOD DEFECTS.

First. The steamship shall remain in the service of the United States under the requisition order to be employed as and where the United States may from time to time determine and for such period of time as the United States may determine, but such period shall not extend beyond the first arrival of the steamship in an American port six months after peace is declared unless she shall be required for Government purposes. The vessel, when placed at the disposal of the United States, as directed by it, shall be or shall forthwith be made by and at the expense of the owner tight, staunch, strong, and well and sufficiently tackled, appareled, furnished, outfitted, and equipped, and in every respect seaworthy and in good running order and condition; and shall be fit for the service in which she has usually been employed, having on her delivery United States inspection certificate that she has met all requirements to fit her for the trade in which she is employed at the time of the requisition, except that no such certificate shall be required if she be a foreign-built vessel not at present subject to the United States steamboat-inspection laws as provided in the Panama Canal act, as amended August 18, 1914, and having a full complement, including the master, officers, and crew, for a vessel of her tonnage. Any deficiency in these respects must be remedied forthwith by and at the expense of the owner, and any time lost in remedying any such deficiency is not to be paid for by the United States.

OPERATION OF VESSEL, WAGES, ETC.—SPECIAL EQUIPMENT—COMPLEMENT OF VESSEL.

Second. The owner shall operate the vessel for the United States, shall provide and pay for all provisions, wages, bonuses, and consular shipping and discharging fees of the

master, officers, and crew, and shall provide and pay for all cabin, deck, engine-room, and other necessary stores, and shall maintain the steamship in a thoroughly efficient state in hull and machinery, tackle, apparel, furniture, and equipment during the service. If the service requires any special equipment in addition to that required for the vessel's previous usual service, such equipment shall be provided and paid for by the United States. The ordinary crew as required by law to operate the vessel overseas and in trans-Atlantic service shall be considered a full complement, and any extra men, such as wireless operators, armed guards, or others, not required by law for ordinary merchant overseas and trans-Atlantic service, shall be paid for by the United States. The owner shall, however, provide proper subsistence for such extra men at reasonable rates to be fixed by the United States.

STATUS OF VESSEL.

Third. The vessel, while being so operated by the owner, shall not have the status of a public ship, and shall be subject to all laws and regulations governing merchant vessels, and the owner shall take all proper steps to prevent any suit or process from interfering with her service.

WHEN A PUBLIC SHIP.

When, however, the requisitioned vessel is engaged in the service of the War or Navy Department, the vessel shall have the status of a public ship, and although the owner shall continue to provide and pay for all the items stated to be provided, and paid for by the owner while operating the vessel as provided in clause "Second," the master, officers, and crew shall become the immediate employees and agents of the United States, with all the rights and duties of such, the vessel passing completely into the possession and the master, officers, and crew absolutely under the control of the United States. The owner, master, officers, and crew shall be notified of the commencement and termination of the vessel's employment in the service of the War or Navy Department, and a proper notation shall be made on the ship's articles prior to the signing thereof, showing that the master, officers, and crew have entered into the service of the United

States. Monthly, or as soon as possible after the termination in a United States port of any voyage in the service of the War or Navy Department, the owner shall furnish the United States as a voucher a statement by the United States Shipping Commissioner which shall certify the dates and amounts of the payment of the wages and bonuses of the master, officers, and crew as the same appear on the completed articles.

NATIONALITY OF CREW.

Fourth. So far as practicable, every member of the crew shall be an American citizen, citizens and subjects of enemy or ally of enemy nations always excluded. Full list of crew, with their ratings and nationalities, shall, if required, be produced to the United States at the time of the delivery of the vessel or on the entry into the pay of the vessel of such member or members of the crew.

UNITED STATES WILL PROVIDE FUEL, ETC.

Fifth. The United States shall provide and pay for all coals or other fuel, fresh water, port charges, pilotages, agencies, commissions, brokerage, wharfage, and consular charges (except those pertaining to the master, officers, and such part of the crew as the owner is responsible for under clause "Second"), and all other usual expenses paid by charterer under so-called "Government form time charter," except as otherwise provided. The United States shall reimburse the owner for all income or excess-profits taxes in foreign countries upon income or profits derived from the vessel and accruing to the United States.

DUNNAGE.

Sixth. The United States shall provide the necessary dunnage and shifting boards, but the owner shall allow the United States the use of dunnage and shifting boards already on board the steamship, the United States to have the privilege of using the shifting boards for dunnage, but making good any damage thereto.

FUEL ON DELIVERY AND REDELIVERY.

Seventh. The United States shall accept and pay for all fuel on board at the time of delivery under the requisition order, and the owner shall on the redelivery of the steamship pay for all fuel left on board at the current market price at the respective ports of delivery and redelivery. A statement of such fuel shall be furnished forthwith by the owner to the United States for verification.

PAYMENT OF HIRE.

Eighth. The United States shall pay for the use of the steamship at the monthly rate which shall from time to time be established by the United States Shipping Board for a vessel of her description, commencing on and from the hour that she shall be ready for delivery under the requisition (and is so reported to the United States) and at and after the same rate for any part of a month, hire to continue until the hour at which the vessel may be ready for redelivery at a United States port (and is so reported to the owner).

If the United States Shipping Board shall hereafter lower the rate of hire from that in effect on the date of the requisition, the owner shall have the option of canceling this requisition charter as of the date of such reduction, without prejudice to the rights of either party.

Payment of hire shall be made in the District of Columbia, in cash, monthly, as earned, at the end of each calendar month. If the vessel is lost, hire shall be paid up to and including the date of her loss (if the time of her loss be uncertain, then up to and including the date she is last heard from).

DEAD-WEIGHT TONNAGE.

Dead-weight tonnage shall be based on summer freeboard assigned or to be assigned with reference to North Atlantic service, according to the standards of any recognized classification society; proper evidence of such assignment, together with a true copy of the dead-weight scale of the vessel, shall, if possible, be furnished by the owner. Until reasonable opportunity has been afforded the owner to procure such assignment, hire shall be paid on dead-weight tonnage as certified by the owner; any excess or deficiency in such

hire to be adjusted upon subsequent determination of summer freeboard.

CLASSIFICATION.

Ninth. A certified statement from a recognized classification society that the vessel has been classed as fit for her previous usual service shall, if obtainable at a reasonable cost, be furnished by the owner. Any alterations which are made to obtain a class for North Atlantic service which are not required to obtain a class for the vessel's previous usual service shall be made by and at the expense of the United States, but there shall be no deduction from the hire for time consumed in making such alterations. So far as the exigencies of the service will permit, the owner shall do all things necessary to maintain the vessel's class.

INCREASE IN CREW'S WAGES AND BONUSES.

Tenth. In addition to the aforesaid compensation for use of the steamship, the United States agrees to reimburse the owner for any proper increases in wages and bonuses over the standard prevailing August 1, 1917, for master, officers, and crew, the owner to produce satisfactory evidence of such increases in wages or bonuses.

INVENTORY OF OUTFIT.

Eleventh. The United States shall have the use of all outfit, equipment, and appliances without extra cost, and the same or their substantial equivalent shall be returned to the owner when the vessel is redelivered in the same or as good order and condition as when received, ordinary wear and tear and damage due to the operation of risks assumed by the owner excepted. An inventory shall be furnished forthwith by the owner to the United States for verification.

INSURANCE OF VESSEL.

Twelfth. The owner shall assume the marine risks, including collision liabilities (excepting losses and liabilities arising from war risks). The United States shall assume war risks (including collision liabilities), as excluded by the following clause in the American hull policy, 1916 form: "Warranted free of capture, seizure, arrest, restraint, or detainment, or

the consequences thereof, or of any attempt thereat (piracy excepted), and also from all consequences of hostilities or warlike operations, whether before or after the declaration of war."

When, however, the requisitioned vessel is used upon voyages different from those from which she has been taken and for which she was intended, and by reason thereof the owner is compelled to pay an excessive premium in the new service in which she is engaged as compared with other vessels in such service of approximately the same age, class, and value, the facts may be shown to the United States Shipping Board, and if the facts are so found the United States will pay the excess premium, based upon value not in excess of that on which the vessel has heretofore usually been insured. The value thus insured shall not be deemed in any way indicative of the just compensation to be paid in case of loss or damage due to the operation of risks assumed by the United States.

The United States also shall pay additional premium (based upon value not in excess of that on which the vessel has heretofore usually been insured) required for voyages outside the following warranties:

a. Warranted not to enter or sail from any port or ports, place or places in British North America on the Atlantic coast, except Halifax, Louisburg, and Sydney, for purpose of coaling, arming, and compulsory examination by the British Government, and not north of 50° north latitude on the Pacific coast.

b. Warranted not to enter the Baltic beyond 13° east longitude, or sail from a loading port therein between October 1 and April 1.

c. Warranted not to sail for or from any port or place on the north coast of Europe between North Cape and Cape Kanin, and not to proceed east of Cape Kanin in the Arctic Ocean.

d. Warranted not to sail with Indian coal as cargo between March 1 and June 30.

e. Warranted not to sail for or from any port or place in the Bering Sea or Alaska or Siberia (except that vessels may enter or sail from Vladivostok between May 1 and November 1).

And if the vessel be seaworthy at the time of her delivery under the requisition and at the commencement of the voyage from the United States, but subsequently becomes unseaworthy so as to constitute a breach of marine insurance warranty of seaworthiness, and such unseaworthiness be not due to or permitted to continue by the neglect or misconduct of the owner or his agents, and loss or damage ensues which is proximately occasioned by such unseaworthiness, the United States will assume such marine loss, in case the same shall be uncollectible, the extent of which shall be ascertained as of the date of such loss or damage. The United States Shipping Board shall have the right to determine finally any question of fact arising under this paragraph.

Upon giving five days' written notice the United States may elect to assume all marine risks, including collision liabilities.

In the event and to the extent that the owner shall not be able to secure marine insurance from established insurance companies, at rates considered reasonable by the United States Shipping Board, the United States shall assume the marine risks, including collision liabilities, until such time as the owner shall be able to secure such insurance.

Whenever the United States assumes the marine risks, including collision liabilities, or any part thereof, a deduction which in the opinion of the United States Shipping Board represents a proper premium charge shall be made from the monthly rate of hire.

If the vessel shall be lost in a service where she may have been exposed to both war and marine risks, in the event of there being no evidence as to whether loss is due to marine or war risk, it shall be presumed to be due to war risk.

The owner shall insure against the usual protection and indemnity risks for the full protection of the owner and the United States, the expense thereof to be borne 50 per cent by the owner and 50 per cent by the United States.

INSURANCE OF CREWS.

Thirteenth. Except when the vessel becomes a public ship, as provided in clause "Third," the owner must provide and pay for all insurance on the master, officers,

and crew, as required by law; provided, however, that the United States shall reimburse the owner for all war-risk insurance, required by law, on the master, officers, and crew.

COMPENSATION IN EVENT OF LOSS OR DAMAGE—OPTION TO SUBSTITUTE VESSEL.

Fourteenth. In case of loss or damage due to the operation of a risk assumed by the United States, just compensation for such loss or damage, with interest at 6 per cent per annum commencing 30 days after proof of such loss or damage, shall be paid by the United States in the District of Columbia, interest not to be paid, however, if the owner resorts to any court for the purpose of establishing the amount of the just compensation. The United States shall, however, have the option (to be exercised within 90 days after the date of loss or constructive loss as provided in clause "Fifteenth") of delivering to the owner within a year after the loss, in lieu of such payment, a vessel of substantially similar tonnage, type, class, and value and of substantially no greater age (any deficiency in value to be paid for in cash), paying interest in the meanwhile from the date of loss at the rate of 6 per cent per annum on the value of the lost vessel.

CONSTRUCTIVE TOTAL LOSS.

Fifteenth. If the steamship sustains serious damage or other injury arising from the operation of a risk assumed by the United States, to such extent that the United States shall, without regard to any rule of law, consider her a total loss, the United States shall have the option (to be exercised within 90 days thereafter) of declaring the steamship to be a total loss as of the date of the damage, and of taking over or selling her, and the owner's rights as to compensation shall be the same as provided in clause "Fourteenth," interest to commence 30 days after proof of the damage.

SPACE AND ACCOMMODATIONS.

Sixteenth. The whole reach of the vessel's holds, decks, and other places of loading and accommodations (not to be loaded beyond what she can reasonably stow and carry) shall be at the disposal of the United States, reserving only proper

and sufficient space for ship's officers, crew, tackle, apparel, furniture, provisions, stores, and fuel.

DUTIES OF MASTER.

Seventeenth. The master shall prosecute his voyages with the utmost dispatch, shall render all customary assistance with ship's crew and boats, and use all diligence in caring for ventilation of the cargo. The master shall be under the orders and directions of the United States or its nominees as regards employment or agency. The United States shall load, stow, and trim the cargo at its own expense and risk under the supervision of the master, who is to have bills of lading for cargoes signed as presented, without prejudice to any term or provision of this contract, and the United States hereby agrees to indemnify the owner from all consequences or liabilities that may arise from the master's signing bills of lading or otherwise complying with the orders and directions of the United States.

RESPONSIBILITY FOR NAVIGATION.

Eighteenth. The master shall obey all orders and instructions which he may receive from the United States or from any of its nominees, and shall in all respects comply with any confidential instructions for masters which may be issued by the United States, but he shall be the agent of the owner in all matters respecting the management, handling, and navigation of the vessel, except when the vessel becomes a public ship or is otherwise subject to the immediate orders of the United States in respect to such matters.

SAILING DIRECTIONS.

Nineteenth. The United States shall furnish the master from time to time with all requisite instructions and sailing directions, and he shall keep a full and complete log of each voyage, which is to be patent to the United States at any time.

COMPLAINTS.

Twentieth. If the United States shall have reason to be dissatisfied with the conduct of the master, officers, or any member of the crew, the owner shall, on receiving particulars

of complaint, investigate the same, and if necessary make a change in the appointments. In case of an emergency not permitting of such complaint and investigation, the United States shall have power to remove the master, officers, or any member of the crew and to appoint others in their places, but if possible the owner shall be consulted in the making of such appointments.

SUPERCARGO.

Twenty-first. The United States may appoint a representative to accompany the steamship, who shall be furnished, free of charge, with first-class accommodations, if space permits, and the same fare as provided at the captain's table.

LAPSE OF HIRE.

Twenty-second. In the event of loss of time from deficiency of men or stores, breakdown of machinery, stranding, collision, dry-docking for the purpose of examining or painting underwater parts or making any repairs, or from any other cause preventing the working of the vessel for more than 24 consecutive hours, the hire shall be reduced one-half until the vessel be again in an efficient state to resume her service, provided, however, that in case of loss of time in aport in the war zone, or at sea, due to any such cause, no such reduction shall be made if the owner shall show that he used due diligence to avoid such loss of time. Provided further, that there shall be no reduction of hire on account of loss of time arising from a war risk. Should the vessel be driven into port or anchorage by stress of weather, or from any accident to cargo, detention or loss of time occasioned thereby shall not be the cause for any cessation or reduction of hire. In any case of loss of time for which no reduction of hire is made, credit shall be given to the United Statesfor any expenses saved by the owner during such time.

DRY-DOCKING.

Twenty-third. The steamship shall be dry-docked and her bottom cleaned and painted in the United States whenever the United States and the master think necessary, but at least once in each eight months, provided the exigency permits.

LIMITATION OF LIABILITY.

Twenty-fourth. Throughout the period of service under this "Time Form" losses or damages arising or occasioned by the following causes shall be always excepted, viz, the act of God, perils of the seas, fire on board, in hull, craft, or on shore, barratry of the master or crew, enemies, pirates, robbers or thieves, arrest and restraints of princes, rulers, and peoples, collisions and strandings, explosions, bursting of boilers, breakage of shafts, or any latent defect (even if existing at the beginning of the voyage) but not discoverable by due diligence, in the hull, boilers, machinery, or appurtenances, negligence, default, or error in judgment of the pilot, master, or crew, or other servants of the owner, in the management or navigation of the steamship.

This "time form" is subject to all the terms and provisions of and any or all the exemptions from liability contained in the act of Congress approved February 13, 1893.

GEAR—LIGHTS.

Twenty-fifth. The owner shall provide gear for all ship's derricks and shall maintain the gear of the vessel as fitted. The owner shall provide oil and lanterns for night work or vessel shall give use of electric lights when fitted therewith. The owner shall provide ropes, falls, slings, and blocks necessary to handle ordinary cargo up to 3 tons in weight, but at the expense of the United States.

DAY AND NIGHT WORK—OVERTIME.

Twenty-sixth. The vessel shall work day and night, as required, and the steam winches shall be at the service of the United States by day and night, with full steam; whenever possible without additional expense to the owner, same to be worked free of cost by the crew. The United States shall reimburse the owner for all overtime, provided the same be certified by the agent or nominee of the United States, or, if no agent is present, by the master, at such standard rates as may be in force from time to time.

ALTERATIONS AND VESSEL'S CONDITION ON REDELIVERY.

Twenty-seventh. The United States may at any time remove or alter, at its expense, all or any of the fittings of

the vessel, and may erect any new fittings which may be required to render the vessel available for service to the United States, provided that she shall, at the cost of the United States, be redelivered to the owner in the same or as good order and condition as that in which she was when delivered to the United States, ordinary wear and tear and damage due to the operation of risks assumed by the owner excepted, or just compensation for the damage thus occasioned to the vessel, with interest at 6 per cent per annum commencing 30 days after the proof of such damage upon redelivery of the vessel, shall be paid by the United States, in the District of Columbia, interest not to be paid, however, if the owner resorts to any court for the purpose of establishing the amount of the just compensation.

SALVAGE.

Twenty-eighth. All derelicts and salvage shall be for the equal benefit of the United States and the owner, after deducting all expenses incident thereto and the proportion due to the master, officers, and crew.

GENERAL AVERAGE.

Twenty-ninth. General average, if incurred, shall be settled at New York according to York-Antwerp Rules of 1890 and Antwerp Rule of 1903, and as to matters not covered thereby according to the customs and practice of the port of New York.

LIENS.

Thirtieth. The United States shall have a lien on the vessel for all moneys paid and not earned or due to the owner and for all advances and overpayments made, and the United States shall have a lien on all cargoes and goods for the payment of freights and charges, including dead freight, demurrage, forwarding charges, charges for carriage to port of shipment, and for general average claims.

Thirty-first. No Member of or Delegate to Congress, or Resident Commissioner, nor any person employed by the United States Shipping Board is or shall be admitted to any share or part of this contract, or to any benefit which may arise therefrom, but under provisions of section 116

of the act of Congress approved 4 March, 1909, this stipulation, so far as it relates to Members of or Delegates to Congress, or Resident Commissioners, shall not extend or be construed to extend to any contract made with an incorporated company for its general benefit.

ARBITRATION.

Thirty-second. Any dispute of law or fact arising under this "Time Form," except as to the rate of hire and the compensation for actual or constructive total loss of the vessel, and except as to matters expressly left to be decided by the United States Shipping Board, shall be referred to the arbitration of three persons, one appointed by the owner, one by the United States, and the third by the two so chosen. They may proceed in any manner determined by themselves, and their decision, or that of any two of them, shall be final, and for the purpose of enforcing any award hereunder the agreement may be made a rule of court. Such arbitration shall be a condition precedent to the commencement of any action.

SPECIAL CLAUSES—PASSENGER SHIPS.

Thirty-third. The owner of a passenger vessel shall permit the use, without extra cost therefor, of all cooking utensils and facilities already aboard the vessel, provided the same or their substantial equivalent be redelivered to the owner in the same or as good order and condition as when received, ordinary wear and tear and damage due to the operation of risks assumed by the owner excepted. An inventory of such property shall be furnished forthwith by the owner to the United States for verification.

Thirty-fourth. The owner of a passenger vessel, if requested by the United States, whenever passengers are on board the vessel, shall operate and maintain the saloon mess, for which the owner shall be compensated at reasonable rates to be fixed by the United States.

Thirty-fifth. The owner of a passenger vessel, if requested by the United States, shall operate and maintain a troop mess, in which the meals served shall be the equivalent of the authorized United States Army garrison ration, and for

which the owner shall be compensated at reasonable rates to be fixed by the United States.

Thirty-sixth. Whenever passengers are carried (troops or others) the United States shall receive all the earnings therefrom, and pay all expenses incidental thereto which are not assumed by the owner under the other provisions of this "Time Form," including repairs and upkeep of fittings (subject to ordinary wear and tear but not breakage), and shall also furnish any additions it may require; or, in the alternative shall make a special arrangement with the owner on a per head basis.

SPECIAL CLAUSES—TANKERS—TANKS TO BE OIL-TIGHT.

Thirty-seventh. The owner guarantees that the tanks are oil-tight at the time of delivery and shall take every precaution to maintain them in this condition during the service, but shall not be responsible for leakage.

Thirty-eighth. The owner shall facilitate the discharge of oil fuel to such ships as the United States shall direct, and shall provide a Y piece with necessary reducers for each discharge up to the maximum number which can be used simultaneously.

Bare Boat Form.

PERIOD OF SERVICE—VESSEL TO BE COMPLETELY EQUIPPED AND FIT—MAKING GOOD DEFECTS.

First. The steamship shall remain in the service of the United States under the requisition order to be employed as and where the United States may from time to time determine and for such period of time as the United States may determine, but such period shall not extend beyond the first arrival of the steamship in an American port six months after peace is declared, unless she shall be required for Government purposes. The vessel, when placed at the disposal of the United States, as directed by it, shall be or shall forthwith be made at the expense of the owner tight, staunch, strong, and well and sufficiently tackled, appareled, furnished, outfitted, and equipped, and in every respect seaworthy and in good running order and condition, and shall be fit for the service in which she has usually been employed, having on her delivery United States inspection

certificate that the steamship has met all requirements to fit her for the trade in which she is employed at the time of the requisition, except that no such certificate shall be required if she be a foreign-built vessel not at present subject to the United States steamboat inspection laws as provided in the Panama Canal act, as amended August 18, 1914. Any deficiency in these respects must be remedied forthwith at the expense of the owner; and any time lost in remedying such deficiency is not to be paid for by the United States.

OPERATION—PORT CHARGES.

Second. The United States, at its sole expense, shall man, operate, victual, and supply the vessel.

Third. The United States shall pay all port charges, pilotages, and all other costs and expenses incident to the use and operation of the vessel.

WAR AND MARINE RISKS.

Fourth. The United States shall assume war, marine, and all other risks of whatsoever nature or kind, including all risk of liability for damage occasioned to other vessels, persons, or property.

PAYMENT OF HIRE.

Fifth. The United States shall pay for the use of the steamship at the monthly rate which shall from time to time be established by the United States Shipping Board for a vessel of her description, commencing on and from the hour when she shall be ready for delivery under the requisition (and is so reported to the United States) and at and after the same rate for any part of a month, hire to continue until the hour at which the vessel may be ready for redelivery at a United States port (and is so reported to the owner).

If the United States Shipping Board shall hereafter lower the rate of hire from that in effect on 15 October, 1917, the owner shall have the option of canceling this requisition charter as of the date of such reduction, without prejudice to the rights of either party.

Payment of the hire shall be made in the District of Columbia, in cash, monthly, as earned, at the end of each calendar

month. If the vessel is lost, hire shall be paid up to and including the date of her loss (if the time of her loss be uncertain, then up to and including the date she is last heard from).

DEAD-WEIGHT TONNAGE.

Dead-weight tonnage shall be based on summer freeboard assigned or to be assigned with reference to North Atlantic service, according to the standards of any recognized classification society; proper evidence of such assignment, together with a true copy of the dead-weight scale of the vessel, shall, if possible, be furnished by the owner. Until reasonable opportunity has been afforded the owner to procure such assignment, hire shall be paid on dead-weight tonnage as certified by the owner, any excess or deficiency in such hire to be adjusted upon subsequent determination of summer freeboard.

CLASSIFICATION.

Sixth. A certified statement from a recognized classification society that the vessel has been classed as fit for her usual previous service shall, if obtainable at a reasonable cost, be furnished by the owner. Any alterations which are made to obtain a class for North Atlantic service which are not required to obtain a class for the vessel's previous usual service shall be made by and at the expense of the United States, but there shall be no deduction from the hire for time consumed in making such alterations. So far as the exigencies of the service will permit, the United States shall do all things necessary to maintain the vessel's class.

FUEL AND STORES.

Seventh. The United States shall accept and pay for all fuel and consumable stores in good order and condition on board at the time of vessel's delivery under the requisition order, and the owner shall, on redelivery, pay for all such supplies left on board, at the current market price at the respective ports of delivery and redelivery. An inventory of all such supplies shall be furnished forthwith by the owner to the United States for verification.

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OUTFIT AND EQUIPMENT.

Eighth. The United States shall have the use of all outfit, equipment, and appliances without extra cost, provided same or their substantial equivalent shall be returned to the owner when the vessel is redelivered in the same or as good order and condition as when received, ordinary wear and tear excepted. An inventory of such property shall be furnished forthwith by the owner to the United States for verification.

COMPENSATION IN EVENT OF LOSS OR DAMAGE.

Ninth. In case of actual or constructive loss as provided in clause "tenth," due to the operation of a risk assumed by the United States, just compensation for such loss, with interest at 6 per cent per annum, commencing 30 days after the date of such loss, shall be paid by the United States in the District of Columbia, interest not to be paid, however, if the owner resorts to any court for the purpose of establishling the amount of the just compensation. The United States shall, however, have the option (to be exercised within 90 days after the date of such actual or constructive loss) of delivering to the owner within a year after such loss, in lieu of such payment, a vessel of substantially similar tonnage, type, class, and value, and of substantially no greater age (any deficiency in value to be paid for in cash), paying interest in the meanwhile from the date of loss at the rate of 6 per cent per annum on the value of the lost vessel.

In case of damage (not constituting an actual or constructive loss) due to the operation of a risk assumed by the United States, the vessel shall, at the cost to the United States, be restored to the owner at the expiration of her service under the requisition, in the same or as good order and condition as that in which she was when delivered to the United States ordinary wear and tear excepted, or, just compensation for the damage, with interest at 6 per cent per annum, commencing 30 days after proof of such damage upon redelivery of the vessel, shall be paid by the United States in the District of Columbia, interest not to be paid, however, if the owner resorts to any court for the purpose of establishing the amount of the just compensation.

CONSTRUCTIVE TOTAL LOSS.

Tenth. If the steamship sustains serious damage or other injury to the extent that the United States shall, without regard to any rule of law, consider her a total loss, the United States shall have the option (to be exercised within 90 days thereafter) of declaring the steamship to be a total loss as of the date of the damage, and of taking over or selling her, and the owner's rights as to compensation shall be the same as provided in clause "Ninth," interest to commence 30 days after the date of the damage.

ALTERATIONS AND VESSEL'S CONDITION ON REDELIVERY.

Eleventh. The United States may at any time remove or alter, at its expense, all or any of the fittings of the vessel, and may erect any new fittings which may be required to render the vessel available for service to the United States, provided that the vessel shall, at the cost of the United States, be restored to the owner at the expiration of her service under the requisition in the same or as good order and condition as that in which she was when delivered to the United States, ordinary wear and tear excepted, or just compensation for the damage thus occasioned to the vessel, with interest at 6 per cent per annum, commencing 30 days after the proof of such damage upon redelivery of the vessel, shall be paid by the United States in the District of Columbia, interest not to be paid, however, if the owner resorts to any court for the purpose of establishing the amount of the just compensation.

LIENS.

Twelfth. The United States shall have a lien on the vessel for all moneys paid and not earned or due to the owner and for all advances and overpayments made, and the United States shall have a lien on all cargoes and goods for the payment of freights and charges, including dead freight, demurrage, forwarding charges, charges for carriage to port of shipment, and for general average claims.

ARBITRATION.

Thirteenth. Any dispute of law or fact arising under this "Bare Boat Form," except as to the rate of hire and the com-

pensation for actual or constructive total loss of the vessel and except as to matters expressely left to be decided by the United States Shipping Board, shall be referred to the arbitration of three persons, one appointed by the owner, one by the United States, and the third by the two so chosen. They may proceed in any manner determined by themselves, and their decision, or that of any two of them shall be final, and for the purpose of enforcing any award hereunder the agreement may be made a rule of court. Such arbitration shall be a condition precedent to the commencement of any action.

Fourteenth. No Member of or Delegate to Congress or Resident Commissioner, nor any person employed by the United States Shipping Board, is or shall be admitted to any share or part of this contract, or to any benefit which may arise therefrom, but under the provisions of section 116 of the act of Congress approved March 4, 1909, this stipulation so far as it relates to Members of or Delgates to Congress or Resident Commissioners, shall not extend or be construed to extend to any contract made with an incorporated company for its general benefit.

SPECIAL CLAUSE—PASSENGER SHIP.

Fifteenth. The owner of a passenger vessel shall permit the use, without extra cost therefor, of all cooking utensils and facilities already aboard the vessel, provided the same or their substantial equivalent be returned to the owner when the vessel is redelivered in as good order and condition as when received, ordinary wear and tear excepted. An inventory of such property shall be furnished forthwith by the owner to the United States for verification.

SPECIAL CLAUSES—TANKERS—TANKS TO BE OIL TIGHT.

Sixteenth. The owner guarantees that the tanks are oil tight at the time of delivery.

Seventeenth. To facilitate the discharge of oil fuel, the owner shall provide a Y piece with necessary reducers for each discharge up to the maximum number which can be used simultaneously.

ORDER OF COURT OVERRULING EXCEPTIONS.

Filed February 28, 1921.

In the United States District Court for Maryland, in Admiralty. F. E. Richards, etc., *v.* S. S. *Carolinian.*

The above-entitled cause being heard upon exceptions of the Government of the United States of America as intervenor, it is, this 28th day of February, 1921, ordered by the court that such exceptions be and they are hereby overruled with leave to answer the libel within 15 days.

JOHN C. ROSE,
United States District Judge.

OPINION OF COURT.

Filed March 1, 1921.

In the United States District Court District for Maryland, in Admiralty. F. E. Richards, as liquidator of the Steamship Tregenna Co. (Ltd.), owner of S. S. *Mavisbrook*, *v.* S. S. *Carolinian.*

ROSE, *District Judge:* This is a collision case. The Government has excepted to the libel on the ground that at the time the collision took place the *Carolinian* was under requisition by the Government of the United States, upon the bare-boat charter basis, and was actually being then used as an Army transport, being manned by an Army crew furnished by the War Department.

Subsequent to the collision, and before the arrest, the requisition and charter were terminated, and she was returned to her owner, in whose possession she was when arrested.

The Government says that the only way in which a ship can become responsible in rem for a tort, is through the fault of some one, whose relation to her is such that she is answerable for his shortcomings, and that neither the Government nor its property can ordinarily be held liable for wrong done by its servants or agents.

It further contended that at the time of the collision the *Carolinian* was not employed as a merchant vessel, and therefore the libellant can not rely upon section 9 of the act of 1916.

At the time she was seized by the marshal she was solely employed as a merchant vessel, and at that time she was not immune from ordinary process upon a libel in rem against her. (The *Lake Monroe*, 250 U. S. 246.)

Nevertheless, it is now urged that no liability in rem ever attached to a ship for anything she does while in public service and in possession of the Government. What Chief Justice Waite *said* while on circuit in *The Fidelity*, 8 Fed. Cases, No. 4758, fully sustains this contention. But the Supreme Court, in *Workman* v. *New York City*, 179 U. S. 552, explained that what was *decided* in that case was merely the application of the exception to the mode of execution of a judgment or decree against a municipal corporation, and then went on to say that in the admiralty law the existence of that exception in all cases had been denied citing a case from this district (*Oyster Police Steamers of Md.*, 31 Fed., 763). It expressly declined to pass upon which of the conflicting conclusions on this point was the correct one. The *Siren* was cited, 7 Wall. 163, and the English cases analyzed, and it was then declared that the English law, in harmony with the maritime law of

this country, held that the fact that the wrong had been committed by a public vessel of the Crown afforded no ground for contending that no liability arose because of the public nature of the ship, although it may be, in consequence of a want of jurisdiction over the sovereign, redress can not be given. It said that the public nature of the service upon which the vessel was engaged at the time of the commission of a maritime tort affords no immunity from liability in a court of admiralty, when the court has jurisdiction. In *The Siren*, supra, the libel was in rem.

The language of the Supreme Court is so clear that it does not seem that it is open to two constructions, and such clearly was the opinion of the judges who sat in *The Florence H.*, 248 Fed., 1012; *The Gloria*, 267 Fed., 929; *Samuelson* v. *The F. J. Luchenbach*, 267 Fed., 931; and *The City of Philadelphia*, 263 Fed., 234.

It may be said in this case that the *Carolinian* itself has been released in accordance with the provisions of section 4 of the act of March 9, 1920, and the only question remaining open is whether any liability was incurred for the tort committed while she was in the Government service; and if so, for how much?

It follows from what has been said that the Government's exceptions will be overruled.

UNITED STATES OF AMERICA,
District of Maryland, to wit:

I, Arthur L. Spamer, clerk of the District Court of the United States for the District of Maryland, do hereby certify that the aforegoing is a true copy of the record of proceedings in the therein entitled case

of *F. E. Richards* v. *Steamer Carolinian*, No. 656 admiralty docket in said District Court.

In testimony whereof, I hereby set my hand and affix the seal of the said District Court this 10th day of March, 1921.

[SEAL.] ARTHUR L. SPAMER, *Clerk*.

MEMORANDUM IN SUPPORT OF APPLICATION.

I.

All the jurisdictional questions here suggested have been fully reviewed in a memorandum, to which we ask leave to refer, filed this day in support of a similar application to this court, made by the Government in case No. —— original, entitled "In the matter of the petition of the United States of America, owner of the steamship *Western Maid*." The status of the vessels are different. In the present application the *Carolinian*, privately owned, had been requisitioned by the Government upon the bare-boat basis. At the time of the collision she was a vessel belonging to the Government and employed as an Army transport. At the time of the filing of the libel and her attachment thereunder, she had been reconditioned and redelivered by the Government to her private owners, who had then assigned her to merchant trade. The *Western Maid*, the vessel proceeded against in case No. —— original, has always been owned by the Government. At the time of the collision she was an Army transport devoted to military operations, but at the time of the filing of the libel and her arrest thereunder, was employed by the Government in merchant service. The present application relates to a group of cases, and there are many of them, in which the vessel, privately owned, has been proceeded against by libel in rem,

while operating in owner's own service, but to enforce lien liability alleged to have attached to the vessels while under requisition to the Government and then employed by the Government as troop and cargo transport, mine layers and sweepers, and patrol and guard boats to serve military needs.

II.

It is respectfully submitted that the motion for a writ of prohibition and/or a writ of mandamus should be granted and that a rule should be entered directing the Hon. John C. Rose, judge of the District Court of the United States for the District of Maryland, and the other judges and officers thereof to show cause why the writ of prohibition and/or the writ of mandamus should not issue as prayed for in said petition.

HARRY M. DAUGHERTY,
Attorney General of the United States.
WILLIAM L. FRIERSON,
Solicitor General.
J. FRANK STALEY,
HORACE T. ATKINS,
Special Assistants to the Attorney General.

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Office Supreme Court, U.
FILED
SEP 23 1921
JAMES D. MAHER
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No. 23, Original.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

In the Matter

of

The Petition of THE UNITED STATES OF AMERICA, former requisitioned and chartered owner of the American steamship *Carolinian*, for a Writ of Prohibition and/or a Writ of Mandamus against the Honorable JOHN C. ROSE, Judge of the District Court of the United States for the District of Maryland, and the Officers of said Court.

RETURN TO PETITION FOR A WRIT OF PROHIBITION AND/OR A WRIT OF MANDAMUS.

The Hecla Press, 57 Warren St., N. Y. Tel. Barclay 6280.

Return of Order to Show Cause Against Issue of Writ of Prohibition and/or Mandamus.

Supreme Court of the United States

OCTOBER TERM, 1920.

IN THE MATTER OF The petition of the United States of America, former requisitioned and chartered owner of the American S/S *Carolinian* for a writ of prohibition and/or a writ of mandamus against the Honorable John C. Rose, Judge of the District Court of the United States for the District of Maryland, and the officers of said court.	33 Original.

RETURN OF JOHN C. ROSE, DISTRICT JUDGE OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND, AND OF THE OFFICERS OF SAID COURT.

To the Honorable William Howard Taft, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

In compliance with the order to show cause why the prayer of petition should not be granted, issued by this Honorable Court on April 11, 1921, and served May 12, 1921, the above-named respondents do hereby respectfully present that:

FIRST: On July 9, 1920, F. E. Richards, as liquidator of Steamship Tregenna Co. (Ltd.), owner of the steamer *Mavisbrook*, filed a libel against the steamer *Carolinian*, her engines, boilers, etc., and against all persons lawfully intervening for their interests therein in the United States District Court for the District of Maryland. This libel alleged, among other things, that on the 15th day of February, 1918, while the steamer *Mavisbrook* was lying properly anchored in the harbor of Brest, France, laden with a cargo of lumber, and about to sail from that port, the steamer *Carolinian* ran into and collided with the *Mavisbrook*, the *Carolinian's* stem striking the *Mavisbrook* on the port side of the *Mavisbrook* abreast her main rigging. Said libel further alleged that the said collision was not due to any fault or neglect on the part of the steamer *Mavisbrook*, or those in charge of her, but was due solely to the fault and negligence of the steamer *Carolinian*, and those in charge of her, in various particulars; that by reason of the premises the steamer *Mavisbrook* and her owners had sustained damage, as nearly as could be estimated, in about $20,000, no part of which had been paid though duly demanded. Said libel further alleged that the *Carolinian* was then, or soon would be, within the jurisdiction of the United States District Court for the District of Maryland, and prayed that process in due form of law in accordance with the practice of this

Court in cases of admiralty and maritime jurisdiction might issue against the steamer *Carolinian*, her engines, boilers, etc., and that all persons having or claiming any interest therein be cited to appear and answer the matters aforesaid, and that the libelant might have a decree for the damages sustained by it as aforesaid, together with interest and costs, and that the steamer *Carolinian*, her engines, boilers, etc., might be condemned and sold to pay the same, and that the libelant might have such other and further relief as might be just.

A copy of the said libel which is annexed to the petition and is printed on pages 10 to 13 thereof is made a part of this return.

SECOND: On July 21, 1920, the Hon. Robert R. Carman, United States Attorney for the District of Maryland, filed a suggestion in the suit above mentioned, stating that the steamship *Carolinian* was a privately owned vessel not in the possession of the United States or of any corporation in which the United States or its representatives own the entire outstanding capital stock; that the said steamship *Carolinian* had been arrested or attached upon a cause of action alleged to have arisen from previous possession, ownership or operation of the said steamship by the United States or by such corporation, and that

> "The United States further suggests that it is interested in the above-entitled cause; that it desires the immediate release of said steamship *Carolinian* from said arrest or attachment without bond or stipulation therefor; and that the United States assumes the liability for the satisfaction of

any decree obtained by the above-named libelants in the above-entitled cause.

By direction of the Attorney General of the United States."

A copy of the suggestion, which is annexed to the petition and printed on pages 13 and 14 thereof, is made a part of this return.

THIRD: Upon the same day (July 21, 1920) and upon the foregoing suggestion, it was ordered by the Court that the steamship *Carolinian* should be released. A copy of this order, which is annexed to the petition and printed at page 14 thereof, is made a part of this return.

FOURTH: On January 6, 1921, the Hon. Robert R. Carman, United States Attorney for the District of Maryland, as proctor for the Government of the United States of America, filed a further suggestion on behalf of the United States in which, claiming to appear specially, he stated that at the time of the said collision, February 15, 1918, the steamer *Carolinian* had been requisitioned by the Government of the United States upon a bare boat basis, by virtue of the authority of the Act of Congress of June 15, 1917, and the executive order of July 11, 1917, and that thereby the said s/s *Carolinian* at the time of the happening of the said collision was a vessel belonging to the United States. A copy of the charter of the s/s *Carolinian* to the United States is attached to and made a part of the suggestion.

Said suggestion further stated that at the time of the collision the *Carolinian* had been assigned

to the War Department of the United States and was employed by it as an army transport, then being manned by and through an army crew furnished by the War Department of the United States. That after said collision the War Department released said steamship from requisition and cancelled her requisition charter and redelivered her to her owners, and that at the time of the filing of the libel herein said steamship was employed by her owners in their own service.

It was further suggested that as said steamship *Carolinian* at the time of said collision was a vessel belonging to the United States and employed in public service for war needs, no liability by reason of the said collision was created which survives or becomes enforcible against the vessel upon her redelivery from public service to her owners as aforesaid, and that there is now no collision claim enforcible *in rem* against the said s/s *Carolinian*.

The said suggestion concluded with a prayer that this Court declare that there is no right in the libelant herein to maintain said libel *in rem* against said steamship to recover its collision damages, and that the said libel be dismissed wth costs.

A copy of the said suggestion which is annexed to the petition and printed at pages 14 to 36 thereof is made a part of this return.

FIFTH: Thereafter the cause having come on to be heard on exceptions of the Government of the United States of America, as intervenor, it was on February 28, 1921, ordered by the Court that the exceptions be overruled with leave to answer the libel within fifteen days. A copy of said

order, which is annexed to the petition and printed at page 37 thereof, is made a part of this return.

SIXTH: On March 1, 1921, the Hon. John C. Rose, Judge of the United States District Court for the District of Maryland, filed an opinion stating the reasons for which the said exceptions were overruled. A copy of this opinion, which is annexed to the petition and printed at pages 37 to 39 thereof, is made a part of this return.

The respondents respectfully submit that the United States District Court for the District of Maryland had jurisdiction of the subject-matter of this suit and the *res* therein attached.

Having fully answered the petition it would appear that said rule should be dismissed and said writ denied and that the respondents be hence dismissed.

Messrs. Haight, Sandford, Smith & Griffin and Brown, Marshall, Brune and Parker, proctors for the libelants in the original suit, having desired to be heard, in order to secure them such opportunity, the respondents hereby designate them or such associate counsel as they may select to present this return and to file such brief and make such argument as may be required on the order to show cause.

IN WITNESS WHEREOF, I, JOHN C. ROSE, Judge of the District Court of the United States for the District of Maryland, have hereunto set my hand and the seal of this Court this 14th day of September, 1921.

JOHN C. ROSE,
U. S. District Judge.

(SEAL OF DISTRICT COURT)

DEC 12 1921
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1921. No. 23. ORIGINAL.

IN THE MATTER

of

THE PETITION OF THE UNITED STATES OF AMERICA, FORMER REQUISITIONED AND CHARTERED OWNER OF THE AMERICAN STEAMSHIP "CAROLINIAN", FOR A WRIT OF PROHIBITION AND/OR A WRIT OF MANDAMUS AGAINST THE HON. JOHN C. ROSE, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND, AND THE OFFICERS OF SAID COURT.

BRIEF ON BEHALF OF THE HONORABLE JOHN C. ROSE, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND, AND THE OFFICERS OF SAID COURT.

HAIGHT, SMITH, GRIFFIN & DEMING,
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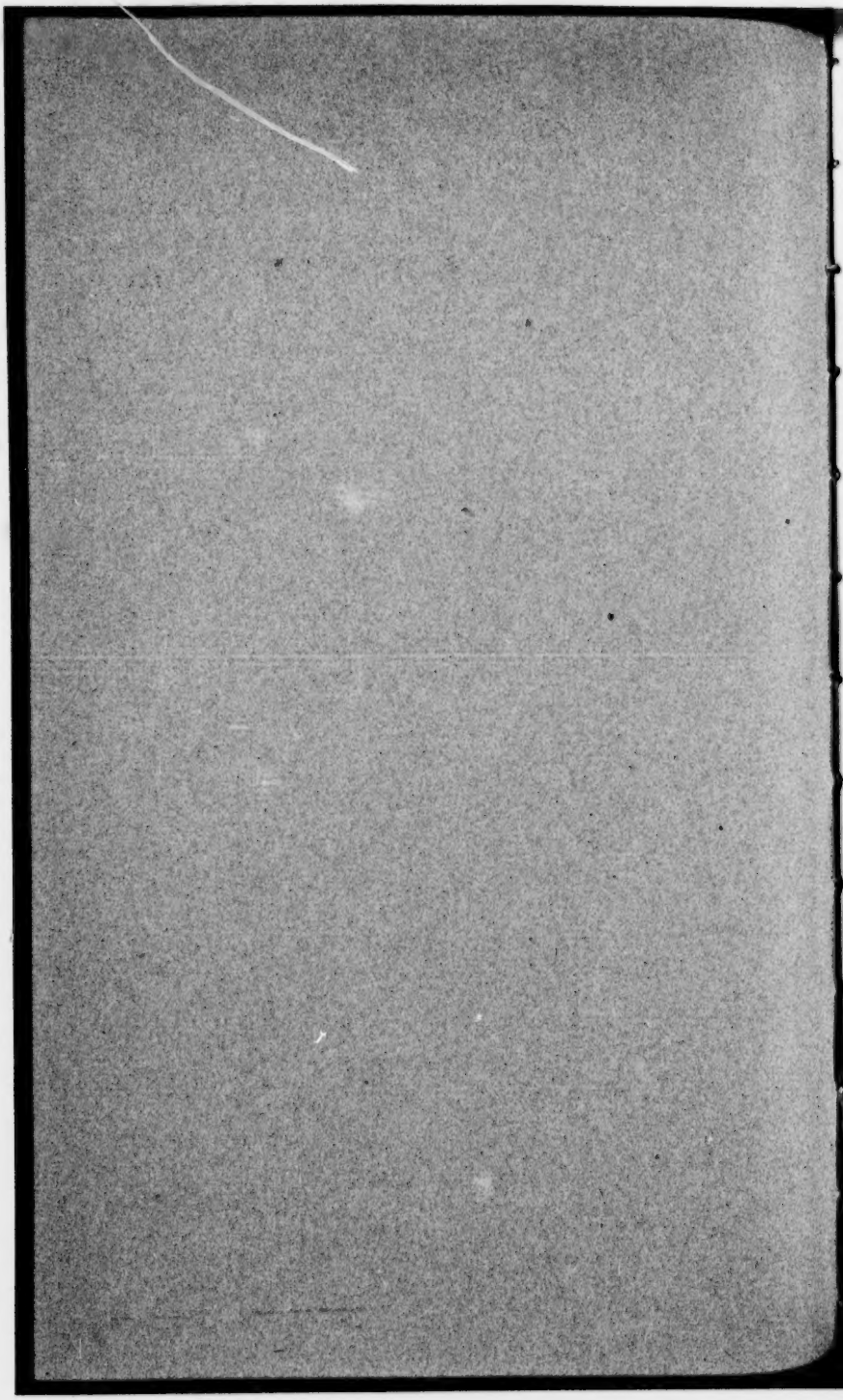

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IN THE

Supreme Court of the United States.

IN THE MATTER *of* THE PETITION OF THE UNITED STATES OF AMERICA, FORMER REQUISITIONED AND CHARTERED OWNER OF THE AMERICAN STEAMSHIP "CAROLINIAN" FOR A WRIT OF PROHIBITION AND/OR A WRIT OF MANDAMUS AGAINST THE HON. JOHN C. ROSE, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND AND THE OFFICERS OF SAID COURT.	October Term 1921 No. 23 Original.

Brief on behalf of the Honorable John C. Rose, Judge of the District Court of the United States for the District of Maryland, and the Officers of said Court.

STATEMENT.

This is an original proceeding based on the petition of the United States for a writ of prohibition and/or a writ of mandamus.

Facts.

On July 9, 1920, F. E. Richards, liquidator of the Steamship Tregenna Company, Ltd., owner of the steamer *Mavisbrook*, filed a libel *in rem* in the U. S. District Court for the District of Maryland against the steamship *Carolinian* to recover damages sustained by the *Mavisbrook* in a collision with that vessel.

After appropriate allegations as to the incorporation of the libelant and its ownership of the *Mavisbrook*, the libel alleged that on February 15, 1918, while the *Mavisbrook* was lying at anchor, the steamship *Carolinian* ran into her head on, striking the *Mavisbrook* on the port side abreast her main rigging; that the collision was not due to any fault or neglect on the part of the steamer *Mavisbrook* or those in charge of her, but was due solely to the fault and negligence of the steamer *Carolinian* and her navigators in several particulars duly stated. Damages were alleged in the amount of about $20,000 as nearly as could then be estimated, and the libel contained the usual jurisdictional averment that the *Carolinian* was then or soon would be within the jurisdiction of the Court.

The prayer of the libel was that process in due form of law should issue against the steamer *Carolinian*, her engines, boilers, etc., that all persons having or claiming any interest therein should be cited to appear and answer the matters aforesaid, that the libelant should have a decree for the damages sustained, together with interest and costs, and that the steamer *Carolinian* might be condemned and sold to pay the same. It was, in

short, an ordinary libel *in rem*, filed by a private party to recover collision damages against a privately owned vessel. No relief was asked against the United States or any property belonging to or in the possession of the United States.

On July 21, 1920, the Hon. Robert R. Carman, United States Attorney, filed a suggestion, stating that the steamship *Carolinian* was a privately owned vessel not in possession of the United States or of any corporation in which the United States or its representatives owned the entire outstanding capital stock, and that the said steamship had been arrested or attached upon a cause of action alleged to have arisen from previous possession, ownership or operation of said steamship by the United States or such corporation. It was further suggested that the United States was interested in the cause, that it desired the immediate release of the said steamship from the said arrest or attachment without bond or stipulation, and that the United States agreed to assume liability for the satisfaction of any decree obtained by the libelants in the cause.

This suggestion was filed pursuant to Sec. 4 of the Act of Congress approved March 9, 1920,* (41 Stat. 525) providing that if a privately owned vessel not in the possession of the United States is arrested or attached in an action based on the previous possession, ownership, or operation of the United States, it shall be released upon a suggestion that the United States is interested in the suit and assumes liability for the satisfaction of any decree rendered in favor of the libellant.

An order was thereupon made releasing the *Carolinian* from arrest.

* The text of this statute will be found in the Appendix.

On January 6, 1921, the Hon. Robert R. Carman, United States Attorney, as proctor for the Government of the United States of America, filed a further suggestion, stating that at the time of the said collision, the steamship *Carolinian* had been requisitioned by the Government of the United States, upon the bare boat charter basis, under the Act of Congress of June 15, 1917, and the Executive Order of July 11, 1917.

A copy of the charter was attached to the suggestion, and is printed in full in the petition on pp. 16 to 36. It is headed, "Requisition Charter" and is executed by the Garland Steamship Corporation, as owner and by the U. S. Shipping Board. After stating certain particulars as to the vessel, immaterial for present purposes, the charter continues:

> "This requisition charter made and concluded upon in the District of Columbia the 28th day of December, 19.., between Garland Steamship Corporation, of ....., of New York, *owner* of the good American single-screw steamship *Carolinian*, of New York, of 4,170 tons gross register and 2,707 tons net register, built in West Hartlepool, England, having engines of 325 nominal horsepower, provided with proper certificate for hull and machinery, and classed 100 A-1 at British Lloyds, of about 348,319 cubic feet capacity and 6,975 sub. to correction tons deadweight capacity, summer free-board, inclusive of permanent bunkers, capable of making an average voyage speed when loaded of 9 knots an hour, under ordinary conditions, on a consumption of about 27 tons of coal, or about ..... barrels of oil, per 24 hours; and the United States of America, through the United States Shipping Board—
>
> Witnesseth:
>
> Whereas by requisition order, dated August

22, 1917, pursuant to the urgent deficiency act of June 15, 1917, and the President's Executive order of July 11, 1917, the United States has requisitioned the *use* of the steamship *Carolinian*, and the steamship has been delivered into possession of the United States pursuant to the requisition; and

Whereas it is desired by the United States and by the owner to fix the compensation (hereinafter called hire) which the United States shall pay to the owner for use of the steamship so requisitioned, and to define by agreement the rights and duties of the United States and of the owner with respect to the operation of the vessel under the requisition, and with respect to other matters in connection therewith:

Now, therefore, it is agreed as follows:" (Italics ours.)

The terms of the agreement were that the *Carolinian* might be employed by the United States either under the "bare boat" or "time" form. The "bare boat" form, under which it is alleged the *Carolinian* was employed, is printed in the petition at pp. 31 to 36, and contains the customary provisions for the bare boat charter of a ship. The vessel when placed at the disposal of the United States was to be tight, staunch, strong and well and sufficiently equipped, etc., and any deficiency was to be remedied forthwith at the owner's expense, any time so lost not to be paid for by the United States. The United States was to man, operate, victual and supply the vessel and pay all port charges, pilotages and other costs and expenses incident to the use and operation of the vessel. The United States was to pay hire to the owners of the vessel at the monthly rate established by the U. S. Shipping Board for a ves-

sel of her description, subject to the owners' right of cancellation if the Shipping Board should lower the rate of hire from that in effect on October 15, 1917. The United States was to have a lien on the vessel for all monies paid and not earned or due to the owner, and for all advances or overpayments made. The United States agreed to assume war and marine risk, "including all risk of liability for damage occasioned to other vessels, persons or property" (Petit., p. 32). The bare boat charter contained other provisions, not necessary to recite, relating to the determination of the vessel's deadweight tonnage, her classification, fuel and stores on delivery and redelivery, outfit and equipment, compensation in event of loss or damage, etc.

The suggestion further states that at the time of said collision the *Carolinian* had been assigned to the War Department of the United States and was employed by it as an army transport, being manned by an army crew furnished by the War Department; that after the collision the War Department released the *Carolinian* from requisition, cancelled her requisition charter and redelivered her to her owners, and that at the time of the filing of the libel herein, the *Carolinian* was employed by her owners in their own service.

The suggestion further alleges that as the *Carolinian* at the time of the collision was a vessel "belonging to" the United States and employed in public service for war needs, no liability by reason of said collision was created which survived or became enforcible *in rem* against the said vessel upon her redelivery from public service to her owners, and that there was then no collision claim enforcible *in rem* against the *Carolinian*.

The suggestion prays that the District Court should declare that there was no right of the libelant to maintain a libel *in rem* against the *Carolinian* to recover the collision damages and that the said libel should be dismissed with costs.

After a hearing on the suggestion Judge Rose, on February 28, 1921, made an order overruling the exceptions of the United States with leave to answer the libel within 15 days. On March 1, 1921, Judge Rose filed his opinion, on which the order made the day previous was based. The opinion and order are printed on pp. 37-39 of the petition.

I.

Inasmuch as the collision occurred by reason of the fault of those lawfully in charge of the Carolinian, a privately owned vessel, a maritime lien was created which became enforcible when government possession had been relinquished.

It is desired at the outset to call the Court's attention to the fact that the case of the *Carolinian* is materially different from that of the *Western Maid*, and other cases, where at the time of the collision title to the ship was in the Government. The *Carolinian* was never the property of the United States. She remained throughout in the ownership of the Garland Steamship Corporation, a private corporation organized under the laws of New York. She was merely *chartered* by the United States,—it is immaterial that this charter was imposed upon her owner *in invitum*. That a maritime lien for collision may be created

against a vessel which, at the time of the collision, is in the possession of a charterer has been so definitely decided by this Court as to preclude further argument of the question.

In *The Barnstable*, 181 U. S. 464, one of the questions before this Court was as to whether a maritime lien for collision had been created against the steamship *Barnstable* which, at the time of the collision, was in the possession of a charterer under a bare boat form of charter. This Court said:

> "The law in this country is entirely well settled, that the ship itself is to be treated in some sense as a principal, and as personally liable for the negligence of any one who is lawfully in possession of her, whether as owner or charterer. *The Little Charles*, 1 Brock. 347, 354. It was said by this court in the case of *The Palmyra*, 12 Wheat. 1, 14, referring to a seizure in a revenue case: 'The thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing; and this whether the offence be *malum prohibitum* or *malum in se*. The same principal applies to proceedings *in rem*, on seizure in the admiralty.' So in *United States* v. *Brig Malek Adhel*, 2 How. 210, speaking of a forfeiture incurred by a piratical aggression, Mr. Justice Story remarked (p. 233): 'That the act makes no exception whatsoever, whether the aggression be with or without the cooperation of the owners. The vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner. . . . It is not an uncommon course in the admiralty, acting under the law of nations, to treat the vessel in which, or by which, or by the master or crew thereof, a wrong or offence has been done, as the offender, without any regard

> whatsoever to the personal misconduct or the personal responsibility of the owner thereof.' This was the principle upon which this court held, in the case of *The China*, 7 Wall. 53, that a vessel was liable for a collision occasioned by the fault of a compulsory pilot—a marked distinction from the English rule, which, by statute, exempts the vessel from such consequences." (181 U. S. 467, 468.)

In *The China, supra*, it was held that the ship was liable *in rem* for a collision due to the negligence of a compulsory pilot,—*it was immaterial that the owners were compelled to employ the pilot by the law.* Commenting upon this decision in *Ralli* v. *Troop*, 157 U. S. 386, this Court said:

> "That decision proceeded, not upon any authority or agency of the pilot, derived from the civil law of master and servant, or from the common law, as the representative of the owners of the ship and cargo; nor upon the law of contribution in general average as between them; but upon a distinct principle of the maritime law, namely, *that the vessel, in whosesoever hands she lawfully is, is herself considered as the wrongdoer, liable for the tort, and subject to a maritime lien for the damages.* 7 Wall. 68. As said by Mr. Evarts, in his argument for the libellants, 'This theory treats the faults of conduct in the vessel's navigation as imputable to the vessel itself, and discards as immaterial all considerations touching the *adjustment* among the navigators, or between them and the owners, of the personal fault or personal responsibility of the misgovernment of the vessel." (Italics ours, 157 U. S., pp. 402, 403.)

The decision in *The China* is settled law in the United States. *Hughes* on *Admiralty*, 2nd ed. (1920), p. 37.

The officers in command of the ~~Mariebrook~~ Carolinian when this collision occurred, while imposed upon the ship by the authority of the government under the Act of Congress of June 15, 1917, occupied no different position from the compulsory pilot imposed upon the *China*.

In *The John G. Stevens*, 170 U. S. 113, where the nature of the maritime lien for collision was exhaustively discussed, it was said:

> "The foundation of the rule that collision gives to the party injured a *jus in re* in the offending ship is the principle of the maritime law that the ship, *by whomsoever owned or navigated*, is considered as herself the wrongdoer, liable for the tort, and subject to a maritime lien for the damages. * * *
>
> "The collision, as soon as it takes place, creates, as security for the damages, a maritime lien or privilege, *jus in re*, a proprietary interest in the offending ship, and which, when enforced by admiralty process *in rem*, relates back to the time of the collision. *The offending ship is considered as herself the wrongdoer, and as herself bound to make compensation for the wrong done.* The owner of the injured vessel is entitled to proceed *in rem* against the offender, *without regard to the question who may be her owners* or to the division, the nature or the extent of their interests in her. With the relations of the owners of those interests, as among themselves, the owner of the injured vessel has no concern." (Italics ours, 170 U. S., pp. 120, 122, 123.)

In *Tucker* v. *Alexandroff*, 183 U. S. 424, this Court said:

> "A ship is born when she is launched, and lives so long as her identity is preserved. Prior to her launching she is a mere congeries

of wood and iron—an ordinary piece of personal property—as distinctly a land structure as a house, and subject only to mechanics' liens created by state law and enforcible in the state courts. In the baptism of launching she receives her name, and from the moment her keel touches the water she is transformed, and becomes a subject of admiralty jurisdiction. She acquires a personality of her own; becomes competent to contract, and is individually liable for her obligations, upon which she may sue in the name of her owner, and be sued in her own name. Her owner's agents may not be her agents, and her agents may not be her owner's agents. *The China*, 7 Wall. 53; *Thorp* v. *Hammond*, 12 Wall. 408; *Workman* v. *New York City*, 179 U. S. 552; *The Little Charles*, 1 Brock. 347, 354; *The John G. Stevens*, 170 U. S. 113, 120; *Homer Ramsdell Co.* v. *Comp. Gen. Trans.*, 182 U. S. 406. *She is capable, too, of committing a tort, and is responsible in damages therefor.*" (183 U. S., p. 438, italics ours.)

In *Workman* v. *New York City*, 179 U. S. 552, the principle of governmental immunity was discussed and the decisions analyzed. In that case an action was brought *in personam* by the owners of the British barkentine Linda Park against the City of New York to recover for damages sustained in consequence of a city fire boat having run down the libelant's vessel. The City of New York defended on the ground that its fire boat was performing a governmental service in responding to a call of fire and that accordingly it could not be held liable for the negligence of the fire boat's navigators. In answering the contention, this Court said:

"The contention is, although the corporation had general capacity to stand in judg-

ment, and was therefore subject to the process of a court of admiralty, nevertheless the admiralty court would afford no redress against the city for the tort complained of, because under the local law the corporation as to some of its administrative acts was entitled to be considered as having a dual capacity, one private, the other public or governmental, and as to all maritime wrongs committed in the performance of the latter functions it should be treated by the maritime law as a sovereign. But the maritime law affords no justification for this contention, and no example is found in such law, where one who is subject to suit and amenable to process is allowed to escape liability for the commission of a maritime tort, upon the theory relied upon. We, of course, concede that where maritime torts have been committed by the vessels of a sovereign, and complaint has been made in a court of admiralty, that court has declined to exercise jurisdiction, but this was solely because of the immunity of sovereignty from suit in its own courts. So, also, where, in a court of admiralty of one sovereign, redress is sought for a tort committed by a vessel of war of another nation, it has been held that as by the rule of international comity the sovereign of another country was not subject to be impleaded, no redress could be given. Both of these rules, however, proceed upon the hypothesis of the want of a person or property before the court over whom jurisdiction can be exerted. As a consequence, *the doctrine above stated rests not upon the supposed want of power in courts of admiralty to redress a wrong committed by one over whom such courts have adequate jurisdiction, but alone on their inability to give redress in a case where jurisdiction over the person or property cannot be exerted.* In other words, the distinction between the two classes of cases is that which exists between the refusal of a court to grant relief because

it has no jurisdiction to do so, and the failure of a court to afford redress in a case where the wrong is admitted and jurisdictional authority over the wrongdoer is undoubted." (179 U. S. 566, italics ours.)

This Court then proceeded to review the American and English decisions as follows:

"The decisions of this court clearly expound the principles we have stated. *The Exchange* (1812), 7 Cranch 116, involved the right of a court of admiralty to enforce, by a proceeding *in rem*, an alleged maritime claim against a vessel of war of a foreign nation. The right to relief was denied exclusively because of a want of jurisdiction over the foreign sovereign or his property.

The Siren (1869) 7 Wall. 153, involved the liability of a prize ship in the possession and control of the officers of the United States for an injury inflicted by a collision of the ship with another vessel, averred to have been occasioned by the negligent management of those in charge of the prize ship. In considering the power of the court to adjudicate the controversy, the court said (p. 185):

'For the damages occasioned by collision of vessels at sea a claim is created against the vessel in fault, in favor of the injured party. This claim may be enforced in the admiralty by a proceeding *in rem*, except where the vessel is the property of the United States. *In such case the claim exists equally as if the vessel belonged to a private citizen*, but for reasons of public policy, already stated, cannot be enforced by direct proceedings against the vessel. It stands, in that respect, like a claim against the government, incapable of enforcement without its consent, and unavailable for any purpose.

'In England, when the damage is inflicted by a vessel belonging to the crown, it was

formerly held that the remedy must be sought against the officer in command of the offending ship. But the present practice is to file a libel *in rem*, upon which the court directs the registrar to write to the Lords of the Admiralty requesting an appearance on behalf of the crown which is generally given—when the subsequent proceedings to decree are conducted as in other cases. Coote's New Admiralty Practice, 31. In the case of *The Athol*, 1 W. Robinson, 382, the court refused to issue a monition to the Lords of the Admiralty to appear in a suit for damage by collision, occasioned to a vessel by a ship of the crown; but the Lords having subsequently directed an appearance to be entered, the court proceeded with the case, and awarded damages. As no warrant issues in these cases for the arrest of the vessels of the crown, and no bail is given on the appearance, it is insisted that they are brought simply to ascertain the extent of the damages, and that the decrees are little more than awards, so far as the government is concerned. This may be the only results of the suits, but they are instituted and conducted on the hypothesis that claims against the offending vessels are created by the collision. *The Clara*, 1 Swabey, 3, and *The Swallow*, 1 Swabey, 30. The vessels are not arrested and taken into custody by the marshal, for the reasons of public policy already stated, and for the further reason that it is to be presumed that the government will at once satisfy a decree rendered by its own tribunals in a case in which it has voluntarily appeared.'

As the prize vessel had been condemned and sold at the instance of the United States, and the proceeds were in the registry of the court for distribution, the court gave the relief sought against the proceeds of the sale, because the facts stated established, not only the liability of the offending ship, but also furnished the basis of jurisdiction.

The same principle was applied in the later case of *The Davis* (1869), 10 Wall. 15, where it was held that personal property of the United States on board of a vessel for transportation from one point to another was liable to a lien for salvage service rendered in saving the property from a peril of the sea, and that such lien might be enforced by a proceeding *in rem*, when the process of the court might be used without disturbing the possession of the government.

The statement of the maritime law of England on the subject now being considered made in *The Siren*, *supra*, makes it clear that, *in harmony with the maritime law of this country, the fact that a wrong has been committed by a public vessel of the crown affords no ground for contending that no liability arises, because of the public nature of the vessel, although, it may be, in consequence of a want of jurisdiction over the sovereign, redress cannot be given.* This is well illustrated by the cases to which we shall now refer.

The Athol, (1842), 1 Wm. Rob. 374, was the case of a British troopship which had run down a brig in the English Channel. The Lords of the Admiralty having refused a petition for compensation, the owner of the brig applied to the High Court of Admiralty to decree a monition to issue against those officials. In declining to issue the monition, for want of power, Dr. Lushington said (p. 382):

'Under the circumstances of this case then, both upon principle and the authority of decided cases, I must decline to issue the monition as prayed. At the same time, sitting here as a judge, in a court of justice, I am bound to express the opinion that I cannot apprehend the high personages who represent Her Majesty in her office of Admiralty, will avoid doing justice, or that, upon a due consideration, they will take upon themselves to say, that they will be themselves the exclusive

judges upon the merits of the present case. Whether they shall appear or not, is not a matter for this court to determine. I decline to grant the monition.'

The Lords of the Admiralty subsequently directed that an appearance should be made on behalf of *The Athol,* and as by this act the court had jurisdiction to determine the controversy, it did so, held *The Athol* to have been in fault, and, despite the public nature of the vessel, 'the damages and costs were pronounced for.'

The Parlement Belge, (1879) 4 P. D. 129, was an action instituted on behalf of the owners of a steam tug against the steamship Parlement Belge and her freight to recover damages sustained by the tug in a collision with the steamship. The latter vessel was, at the time of the collision and when the action was instituted, a public vessel of the Government of the sovereign state of Belgium, navigated and employed by and in the possession of such government, and officered by officers of the royal Belgium navy, holding commissions from His Majesty, the King of Belgium, and in the pay and service of his government. Besides carrying the mails, between Dover and Ostend, the Parlement Belge carried passengers and merchandise, and was employed in earning passage-money and freight. Sir Robert Phillimore declared (p. 144) that the case was one of first impression, and to be decided upon general principles and the analogies of law rather than upon any direct precedent, and it was held that the Parlement Belge did not come within the category of a ship of war or a pleasure vessel belonging to the crown of Belgium, and was not exempt from the process of the court. On appeal, however, (5 P. D. 197), it was held that the admiralty court was concluded by the declaration of the sovereign authority that the vessel was a public vessel of the state, and,

> further, that the mere fact of the ship having been used subordinately for trading purposes did not take away the immunity attaching to the public vessel of an independent sovereignty, and that the vessel could not be proceeded against." (179 U. S., pp. 566 to 570, italics ours.)

After this full review of the decisions this Court announced its conclusion:

> "*It results that, in the maritime law, the public nature of the service upon which a vessel is engaged at the time of the commission of a maritime tort affords no immunity from liability in a court of admiralty, where the court has jurisdiction.*"
>
> (Italics ours: 179 U. S. 570.)

The above decisions show that in order to sustain a suit *in rem* for collision only two conditions need exist: (1) fault on the part of the navigators of the vessel to be proceeded against and (2) the ability of the Court to execute its process by seizure. Admittedly both of these conditions were fulfilled in the case at bar.

Fault on the part of the navigators of the *Carolinian* is alleged in the libel and is, of course, admitted for the purposes of the present proceeding. Nor could any obstacle have been interposed to the execution of the Court's process. Long prior to the filing of the libel, the *Carolinian* had been returned to the possession of the owners and was subject to attachment and seizure to the same extent as any other vessel in private ownership. A lien which was inchoate at the time of the collision, ripened into possession on seizure under process of the Court.

The contentions made on behalf of the United States may be briefly dismissed. It is unnecessary for instance to determine whether the relation of master and servant existed between the crew of the *Carolinian* and the United States. Whether or not legal liability *in personam* was cast upon the United States by reason of that relationship, the navigators of the *Carolinian* were at fault and this alone creates a right *in rem* against the vessel. It becomes unnecessary, therefore, to discuss whether the non-liability of the United States *in personam* is based upon a substantive rule of law or upon a mere defect of procedure. Nor is anything to be gained by contending (in disregard of the authorities just cited) that an inchoate lien cannot be created against property belonging to the United States, for the sufficient reason that the *Carolinian* was not the property of the United States but that of a private corporation. Even if the proposition were correct (and it is submitted that it is not, see *infra*, pp. 22-37), it could not be extended to *privately owned* vessels, in Government possession. It is well settled that the attributes of sovereignty do not inure to the benefit of private individuals.

Thus in *Moran* v. *Horsky*, 178 U. S. 205, suit had been brought to recover a mining claim, the plaintiff's title resting on a patent from the United States. The defendant set up the defence of laches. This court said:

> "But it is well settled that when the government proceeds to set aside its patent, not for the sake of establishing its own right to the property, but in the interest of some person who has an equitable claim thereto, or to whom the government owes the duty of protecting his interests, it is subjected to the

> same defences of laches, limitation and want of equity that would attach to a like suit by an individual." (178 U. S., at p. 213; see p. 56, *infra*.)

The argument made on behalf of the Government in the lower Court is summed up in the opinion of Judge Rose as follows:—

> "The Government says that the only way in which a ship can become responsible *in rem* for a tort is through the fault of some one, whose relation to her is such that she is answerable for his shortcomings, and that neither the Government nor its property can ordinarily be held liable for wrong done by its servants or agents".

Conceding, for the sake of argument, that both positions taken by Government counsel are correct, the libelant would, nevertheless, be entitled to succeed, for it is well settled that a ship is responsible for the negligence of her navigators. No attempt is here being made to hold the Government responsible for wrong done by its servants, nor is this proceeding against Government property.

The recent decisions of this Court in the case of *The Steam Tug Queen City* (#26 original, not yet officially reported U. S. Adv. Ops. 1920-1921, 664) and *In the Matter of the City of New York, Edward S. Walsh, Superintendent, etc., Petitioner* (#25 original, not yet officially reported U. S. Adv. Ops. 1920-1921, 660) are of no help to the Government.

In the *Queen City* case a libel *in rem* was filed against the tug *Queen City* which was owned by the State of New York and was being used by that State in the public service for the repair and maintenance of the Erie Canal. This Court held that

the tug was not subject to seizure because it was being used and employed for public and Governmental purposes.

In the second case libels *in rem* had been filed against three tugs. These tugs were claimed by their owners, a partnership doing business in Buffalo. The claimants of the tugs then filed petitions under the 59th Admiralty Rule (new rule 56) in which they attempted to implead Edward S. Walsh, Superintendent of the Public Works of the State of New York, upon the ground that at the time of the respective disasters the tugs had been chartered to Walsh, as Superintendent of Public Works of the State of New York. The questions before the Court were (1) as to whether a suit in admiralty could be brought against the State of New York and (2) whether a suit against Walsh was in effect a suit against the State of New York. This Court decided the first of these questions in the negative and the second in the affirmative. In other words, all that the decision holds is that there was no power to bring action *in personam* in admiralty against the State of New York.

That a national war vessel may be held in fault for a collision due to the negligence of her officers and crew was directly decided by this Court in *The Sapphire*, 11 Wall. 164.

In that case a collision had occurred between the American ship *Sapphire* and the French transport *Euryale*. To recover for the damages sustained a libel *in rem* was filed against the *Sapphire* in the District Court in the name of Napoleon III, then Emperor of the French, as owner of the *Euryale*. On appeal to this Court it was held that the *Eury-*

ale, as well as the *Sapphire*, was to blame, and that accordingly the damages must be divided.

The collision occurred in consequence of the *Sapphire's* dragging her anchor and drifting down upon the *Euryale*, and this Court held that the officers and crew of the *Euryale* could have avoided the collision if they had promptly hoisted the jib when it was first seen that the *Sapphire* was dragging her anchor. After a discussion of the evidence and the finding that there "was a clear neglect of proper precautions for an entire hour immediately preceding the collision," this Court said:

> "We cannot avoid the conviction that there was a want of proper care and vigilance on the part of the officers of the *Euryale*, and that this contributed to produce the collision which ensued. Both parties being in fault, the damages ought to be equally divided between them." (11 Wall. at p. 171.)

After this decision there can be no question but that a national war vessel may be held at fault for the negligence of her navigators whenever the court obtains jurisdiction. As *Workman* v. *New York City, supra*, shows, the liability of a vessel is not affected by the fact that the navigators who were at fault were public servants engaged on public business.

Throughout the requisition charter to the United States, the relations of the Garland Steamship Corporation, as owner of the *Carolinian*, and the United States, as charterer, are carefully kept distinct. By Section 12 of the charter (petition, page 35) it was provided that the United States should have a lien on the vessel for all moneys paid and not earned, and for all advances or overpayments made. The United States cannot, there-

fore, now contend that it was to have a lien upon its own property, or that the *Carolinian* was immune from liens when it had itself contracted for one. The United States also agreed to assume, by the charter, "all risk of liability for damage occasioned to other vessels, persons or property" (Cl. 4, p. 32). This clause must have been inserted in view of the possibility that a collision lien might attach to the vessel during the currency of the charter. There could be no liability in *personam* on the part of the Garland Steamship Co. as the vessel's crew were not their servants; the only liability left for the United States to assume was the liability of the vessel *in rem*. It was obviously contemplated that a liability *in rem* would exist.

II.

Even if, at the time of the collision, the "Carolinian" had been owned by the United States, an inchoate lien would nevertheless have been created which could be enforced in the present suit.

While there is a very real distinction between a vessel owned by, and one chartered to, the United States, and while the proposition above stated is not necessarily involved in the case at bar, nevertheless, in view of the importance of the question and the far-reaching consequences of a decision establishing immunity, it may not be amiss if the proposition is briefly discussed. If a maritime lien attaches to a vessel *owned* by the Government, *a fortiori* it must also attach to a vessel chartered.

The general principles as to the creation of maritime liens have been considered in the first

division of this brief. According to the decisions of this Court there collected, no exception on the part of government owned vessels is recognized. On the contrary this Court has frequently stated that a maritime lien may arise against a vessel or other floating property of the United States. And there is entire unanimity in the lower Federal Courts that a maritime lien may arise against a vessel of the United States, or of a foreign government, and that this lien may be enforced by attachment, *unless the situation of the property is such that in executing the attachment, the court officers will be brought into collision with the officers of the Government.* Inasmuch as these decisions will be discussed at length by counsel in the other cases to be argued herewith, it is unnecessary for us to do more than give some of the citations with a brief statement of the point decided.

The Florence H., 248 Fed. 1012 (vessel owned by the U. S. and chartered by demise to the French Government for the purpose of carrying foodstuffs to France, held subject to a lien for collision).

The F. J. Luckenbach, 267 Fed. 931 (vessel held subject to a lien though used strictly for government purposes at the time of the collision).

The Gloria, 267 Fed. 929 (vessel owned by the U. S., manned by a navy crew, and used for the transportation of troops to France, held subject to a lien for collision).

The Ceylon Maru, 266 Fed. 396 (vessel owned by the U. S., manned by a navy crew and employed in transporting military supplies to the U. S. Army in France, held subject to lien for collision).

The Johnson Lighterage Co. #24, 231 Fed. 365 (property of the Russian government, destined for its public use, held subject to a lien for salvage services).

The Tampico, 16 Fed. 491 (vessel of the Mexican government held subject to a lien for salvage services).

U. S. v. *Wilder,* 3 Sumner, 308 (lien for general average held to exist against property of the U. S.).

The City of Philadelphia, 263 Fed. 234 (vessel taken over by R. R. Administration held subject to collision lien).

The decisions in this Court which are decisive on the subject are *The Siren,* 7 Wall. 152 (a maritime lien for collision held to be created, where a prize, the property of the United States, ran down a privately owned vessel); *The Davis,* 10 Wall. 15 (a maritime lien for salvage enforced against cotton, the property of the United States), and *Workman* v. *New York City,* 179 U. S. 552, which is discussed under the first heading.

In view of the quotations already given from *The Siren* and *The Davis* an elaborate statement of these cases seems unnecessary. In *The Fidelity,* 16 Blatch. 569, Waite, C. J., sitting in Circuit, attempted a distinction of these two cases on the ground that the property against which liens were asserted was not devoted to the public and employed in carrying on the operations of the Government. The case did not call for any such expression of opinion as all that was *decided* was that a city tug, used exclusively for government purposes, was not subject to attachment.

The headnote states the precise point for which the case stands:

"A steam-tug, the property of a municipal corporation invested with certain powers of local government in a city, and used exclusively by an executive department of such municipal government, as an instrument for performing duties imposed on it by law, *is not liable to seizure* in a suit *in rem* against such steam-tug, in admiralty, in the district court, brought to recover damages for an act of the tug, while actually engaged in public service under the orders of such department." (Italics ours.)

The first paragraph of the opinion is equally explicit:

"It is well settled, that public property, devoted to public uses, and necessary for carrying on the operations of the government, *is not subject to seizure and sale on execution.* The supreme court of the United States had occasion to consider that question at its last term, in Klein *v.* New Orleans, 99 U. S. 149. It was there said, that 'municipal corporations are the local agents of the government enacting them, and their powers are such as belong to sovereignty. Property and revenue necessary for the exercise of these powers become a part of the machinery of government, and, to permit a creditor to seize and sell them to collect his debt, would be to permit him, in some degree, to destroy the government itself.' 'The test in such cases is as to the necessity of the property for the due exercise of the functions of the municipality.' * * * It would seem to be clear, that, if the instruments of government cannot be seized to pay a debt after judgment, they cannot before.

It is said, however, that the maritime law gave the libellant a lien on the tug for his damages, and that, whenever there is a maritime lien, an action *in rem* lies, in admiralty, for its enforcement. It seems to me that the

> same principle which forbids the seizure to pay a debt, forbids the lien, *which can only be enforced by a seizure.*" (Italics ours.)

The confusion of thought which runs through the opinion starts with the sentence last quoted. A lien "which *can* only be enforced by seizure" of Government property, and which, if enforced, would permit the lienor, "in some degree, to destroy the Government itself," is admittedly ineffective, so long as such conditions exist, and that is the only point decided in *The Fidelity* and the only question which called for discussion. In other words, it was held that the tug which still is the property of the municipality was not "liable to *seizure* in a suit *in rem.*"

In *Workman* v. *New York City, The Fidelity* is narrowed down to this precise point. This Court there said:

> "True it is, that under the general law, growing out of the public nature of their duties, where judgments or decrees are entered against municipal corporations, such judgments or decrees may not, as a matter of public policy, be enforced by the levy on property *held by the corporation for public uses.* Meriwether *v.* Garrett (1880), 102 U. S. 472.
>
> As a result of the general principle by which a municipal corporation has the capacity to sue and be sued, it follows that there is no limitation taking such corporations out of the reach of the process of a court of admiralty, as such courts, within the limit of their jurisdiction, may reach persons having a general capacity to stand in judgment. True, also, where admiralty process has been set in motion against a municipal corporation, public policy, it has been held, restrains a seizure of property used for public purposes by such corporation. The Fidelity (1879), 16 Blatch-

> ford, 569. *This conclusion, however, is but the application of the exception as to the mode of execution of a judgment or decree against such a corporation,* to which we have referred, and its existence in the admiralty law in all cases has also been denied. The Oyster Police Steamers of Maryland (1887), 31 Fed. Rep. 763. Which of these conflicting conclusions, as to the exception in question, is correct, we are not called upon on the present record to determine, since no levy of process upon the fire-boat was made or attempted to be made."

The dictum is confessedly opposed to the language of the opinion in *The Siren* and *The Davis* (16 Blatch., at p. 569), and is altogether inconsistent with the opinion of this Court in the Workman case, *supra,* pp. 11-17. The illustration of naval crews libeling a war vessel for their wages, after she had come into private hands, is extravagant. The crew of a man of war are not "seamen" in a legal sense. They serve under the Articles of War and are a part of the armed forces of the Government and as such are not entitled to a maritime lien. An argument equally far fetched is made on behalf of the Government when it is said that there are but few reported cases where a maritime lien has been enforced against a vessel after she has been returned to private ownership. The reasons for this are obvious. Until the time of the Spanish-American War our Navy was small and there was no Government owned merchant fleet. When collisions occurred it was not an infrequent practice for Congress to pass a bill permitting suits *in personam* against the Government. In many instances, too, settlement was reached without resort to the Courts. The instances in which vessels owned or operated by the

Government subsequently came into private hands were negligible.

Nor is there any basis of principle on which the distinction attempted in *The Fidelity* could be rested. The cotton cargo of the *Davis* may have been urgently needed for the manufacture of uniforms. In the case at bar the only information in the record as to the employment of the *Carolinian* is that she was "employed in public service for war needs." She may have been engaged in carrying coal to be used by French factories which would not have made her any the less a merchant vessel under the decision in *The Lake Monroe,* 250 U. S. 246. She may have been carrying a small quantity of military supplies and the bulk of her cargo may have been food for the civilian population. She may have been on her return voyage to the United States with her subsequent employment undetermined. The refinement suggested in *The Fidelity* would be utterly unworkable under modern conditions, and, as will be shown, there is no principle of "prerogative" or rule of public policy which requires that it be now adopted.

The only basis on which the exemption of government property from such a lien can be rested is the *mediæval* doctrine of "prerogative",—a doctrine which forms no part of our jurisprudence, for it is well settled that the United States has only "so much of the royal prerogatives as belonged to the King in his capacity as *parens patriae* or universal trustee." (*Dollar Savings Bank* v. *U. S.*, 19 Wall. 227.)

In *United States* v. *Wilder, supra,* Mr. Justice Story, in discussing whether a maritime lien for general average could exist against property belonging to the United States, said:

> "The question, then, is, whether a like lien exists in regard to goods belonging to the United States. No case has been cited, in which any exception has ever been made in regard to the United States; *nor has any authority been produced to show that it constitutes a known prerogative of any other government or sovereignty.* I have examined the treatises upon the prerogatives of the crown of England, and I do not find there, or in any of the great abridgments of the law under the title 'Prerogative', any such exception recognized, or even alluded to." (Italics ours.)

The concluding part of Mr. Justice Story's opinion is as follows:

> "And it seems to me a fair inference from the duties of the sovereign, in such cases, that where a lien exists on property, upon general principles of justice, *jure gentium*, that lien ought to be presumed to be admitted and protected by every sovereign, until the presumption is repelled by some positive edict to the contrary. None such exists in our country."

Nor is there any principle of public policy which prevents the creation of a maritime lien against a public vessel owned by the United States. Such a lien does not result in interfering with the performance of governmental functions because so long as the vessel is in government possession she is not subject to attachment. It may result in ultimately casting upon the United States the liability for a collision, as to which the navigators of a government vessel were at fault, but that is only just. When the privately owned vessel is at fault, the United States collects its damages from the ship or her owners, and it is only fair that a private owner should have a like right when the

government ship is to blame. Congress has recognized this principle of equality by making the statutory rules for preventing collisions at sea binding upon *public* ships as well as private, 26 Stat. at L. 645; 28 Stat. at L. 645; 2 Fed. Stat. Ann. (2nd ed.) 376, 402, 449. If a merchant ship and a war ship are equally at fault, the damages are divided; *The Sapphire, supra.*

The justice of paying claims arising out of collisions for which public vessels were at fault has always been recognized. By the Act of June 24, 1910 (36 Stat. at L. 607) the Secretary of the Navy is authorized to determine the amounts due arising out of collisions for which naval vessels are found responsible, which claims are to be paid out of moneys appropriated. This statute is, however, limited in amount to claims not exceeding $500. For all larger claims the claimant must secure the passage of a special Act which sometimes merely directs payment and in other cases directs that the question of liability be determined by Court proceedings. It has been the invariable practice of Congress ultimately to pass such an Act. The ensuing delay is, however, often so great as to amount to a denial of justice. A reference to the Acts passed in recent years indicates how great the delay has been in many of the cases:

Bergen-U. S. S. Periwinkle. Accident occurred Jan. 18, 1865. Special Act (31 Stats. 1572) passed 1900.

New York-U. S. S. Dolphin. Accident occurred Aug. 1, 1899. Special Act (32 Stats. 242) passed 1902.

S. S. Foscolia-U. S. S. Columbia. Accident occurred May 28, 1898. Special Act (32 Stats. 242) passed 1902.

Lighter No. 10-Transport Sumner. Accident occurred March 17, 1900. Special Act (33 Stats. 809) passed 1905.

Ella M. Doughty-U. S. S. Massachusetts. Accident occurred June 27, 1901. Special Act (33 Stats. 810) passed 1905.

Olive Frances-U. S. S. Winooski. Accident occurred July 30th, 1866. Special Act (33 Stats. 810) passed 1905.

Maroa-U. S. S. Rocket. Accident occurred Feb. 2, 1907. Special Act (35 Stats. 1622) passed 1909.

Climax-U. S. Tender Cactus. Accident occurred Nov. 25, 1905. Special Act (35 Stats. 1404) passed 1909.

Wilson & Hunting-U. S. S. Culgoa. Accident occurred Nov. 9, 1904. Special Act (36 Stats. 1863) passed 1910.

Dorothy-U. S. S. Sterling. Accident occurred Dec. 3, 1911. Special Act (37 Stats. 1285) passed 1912.

Commonwealth-U. S. S. New Hampshire. Accident occurred July 7, 1912. Special Act (38 Stats. 1244) passed 1914.

S. S. Hesperos-U. S. S. Arethusa. Accident occurred Oct. 18, 1915. Special Act (39 Stats. 1261) passed 1916.

John T. Donohue-C-2. Accident occurred Mar. 28, 1913. Special Act (39 Stats. 1353) passed 1916.

Mabel I. Meyers-U. S. S. Nebraska. Accident occurred July 30, 1915. Special Act (39 Stats. 1393) passed 1916.

Esparta-U. S. Tender Magnolia. Accident occurred Oct. 26, 1905. Special Act (39 Stats. 1474) passed 1917.

It is true that the United States has not as yet passed a general statute permitting suit to be brought in *all* cases where damages have resulted from the faulty navigation of a public vessel. It is clear, however, that this evinces no rule of public policy that the United States should repudiate the just claims of innocent persons whom the negligence of its agents has injured, contrary to the practice of other civilized nations. The long list of special acts, passed to afford relief, is overwhelming evidence that Congress has, for generations, intended that such claims should be paid.

The purpose of Congress is further indicated by a bill now before Congress which will do away with the Government's exemption from suit so far as collision cases are concerned, and make the passage of special acts unnecessary. This bill was favorably reported by the Committee on the Judiciary of the House of Representatives under date of February 7, 1921 (66th Cong. 3rd Sess. House of Representatives, Rept. No. 1301, p. 2 to accompany H. R. No. 15977). As stated in the report,

> "The bill in principle is simply a substitute for the practice, long established, of passing special bills, under which private owners have been allowed to submit to our admiralty courts admiralty claims of this character."

The bill has met with the universal approval of the executive departments, and is expected to pass in the near future.

It is frankly admitted in the brief filed by the Government that there are over two hundred cases, similar to those now before this Court, which involve "losses running into millions of dollars." Probably most of the ships which were guilty of

faulty navigation were privately owned, like the *Carolinian*, and merely operating for the Government, under charters. The suggestion of the Department of Justice is that the innocent third parties who have thus been injured (many of whom have already been kept waiting for their compensation for several years), should be told by this Court that they must go to Congress and clog the calendars of both Houses with private bills, authorizing suit to be brought in each particular case.

There is no pretense that the damage has not been done. There can be no honest reason given for not paying for that damage. It must also be admitted that the practice of Congress has been "long established" to pass enabling acts in all cases where such acts are required. Indeed, on page 17 of the Government's brief, it is said:

> "We must assume that, at the proper time and as it is requested, diplomatically or otherwise, Congress will give these claims the consideration they merit."

The present proceeding, therefore, if successful, would, in the end, save the Government nothing and would inflict upon those who have been injured additional and wholly needless hardship.

Where established precedents force this Court to hold that an enabling act *is* required, before suit can be brought to recover damage done by a public vessel of the United States, special legislation will continue to be necessary, until the general legislation, now pending, is passed. Until then, in such cases, this Court can do no more than say, as Dr. Lushington said in *The Athoi* (*supra*, p. 15):

> "Sitting here as a judge, in a court of justice, I am bound to express the opinion that

> I cannot apprehend the high personages who represent Her Majesty in her office of Admiralty, will avoid doing justice, or that, upon a due consideration, they will take upon themselves to say that they will be themselves the exclusive judges upon the merits of the present case."

But, where the decisions of this Court do permit suits against privately-owned vessels, once they have passed out of the possession of the Government, and where Congress has already specifically provided that the Government may take over the defence and relieve the private owners of that burden, it must be a satisfaction to this Court, rather than otherwise, not to be forced to delay the doing of that which is demanded by simple justice.

The doctrine of the immunity of the sovereign from suit—to which so many exceptions have been made by statute as almost do away with the rule—is based not upon principle but upon precedent. As was stated by this Court, in *United States* v. *Lee*, 106 U. S. 196:

> "It is difficult to see on what solid foundation of principle the exemption from liability to suit rests" (106 U. S., at p. 206).

So in *U. S.* v. *Emery Bird Thayer Realty Co.*, 237 U. S. 28, the Court said of a contention that the government's submission to jurisdiction should be narrowly construed, that it rested "on the inadmissible premise that the *great act of justice* embodied in the Jurisdiction of the Court of Claims is to be construed strictly and read with an adverse eye." (Italics ours, 237 U. S., at p. 32.)

As stated in *Workman* v. *New York City, supra,* in the case of a collision between a British public vessel and the ship of a subject or a foreigner, it is the established English practice to permit the private owner to begin suit in the English courts against the navigating officer of the Government vessel. As a matter of course, the solicitor for the Treasury appears on behalf of the respondent. The case is tried as if between private parties, with similar rights of appeal to either litigant. If it is shown that the public vessel, through her navigators, was at fault, the Government, after judicial assessment of the damages, pays the loss sustained by the private owner.

> Roscoe's Admiralty Practice (1920), pp. 97, 297.
> The Bellerophon, 3 Aspin, M. C. 58.
> The Sans Pareil [1900], Prob. D. 267.
> The St. Paul and The Gladiator, 11 Asp. 152, 169 [1908] Prob. D. 320, [1909] Prob. D. 43.

In France and Germany, relief is afforded through judicial tribunals for the damages sustained under such circumstances. See Goodnow, Comparative Administrative Law, Vol. II, pages 161, 162. Borchard, Diplomatic Protection of Citizens Abroad, p. 166, note 2.

The State of New York which, judged by its wealth and the number of its inhabitants, is of greater consequence than many European nations, is subject to suit for damages arising out of a 'wrongful act, neglect or default'' to the same extent as if it were a private individual or corporation. As stated in *Arnold* v. *State of New York,* 163 App. Div. 253, at pp. 261, 262:

> "While the State, being a sovereign, cannot be sued by a subject without its consent, by one of its own statutes *passed as an act of justice* to its subjects it has expressly assumed liability for damages caused by 'a wrongful act, neglect or default' on its part and has authorized the Board of Claims to hear and determine all claims founded on its negligence, which necessarily means the negligence of its own officers acting within the apparent scope of their powers, or while engaged in conducting its business. (Code Civ. Proc., sec. 264). It has also provided that its liability in such and other cases shall be measured by 'such legal evidence as would establish liability against an individual or corporation in a court of law or equity'. (Id.)" (Italics ours.)

In the *Arnold* case, the State of New York was held liable to persons who had been injured, and to the representatives of other persons who had been killed, for the negligence of its State Fair Commissioners in conducting an automobile race, one of the automobiles leaving the track and killing and injuring some of the spectators. In the *Arnold* case the Court further said:

> "While the Commissioners were not authorized to be negligent any more than the officers of a corporation are so authorized, still they had the capacity to be negligent, and if, in holding a fair for the State they were negligent, it was the negligence of the State, just as the negligence of officers of a corporation is the negligence of such corporation. Otherwise the assumption of liability by the State for damages caused by 'a wrongful act, neglect or default on the part of the State' would be meaningless and without effect. How can the State be guilty of a wrongful act, neglect or default except through its 'officers and

employees,' and if those words were inserted in the statute it would not add to its meaning. (*Sipple* v. *State*, 99 N. Y. 284, 288.) The evidence of negligence in these cases would completely overwhelm a private individual or corporation, and the situation is the same in principle, although the State is defendant. (*Quayle* v. *State of New York*, 192 N. Y. 47, 51; *Bowen* v. *State of New York*, 108 id. 166; *Burks* v. *State of New York*, 13 Court of Claims, 153; less fully reported, *sub nom Burke* v. *State of New York*, 64 Misc. Rep. 558)." (163 App. Div. at p. 262.)

To sum up the position of the libelant: This Court and the other federal courts have frequently decided that a vessel, even though owned by the United States and employed in public service, is subject to a maritime lien for collision which may be enforced by a proceeding *in rem*, provided the government's possession is not interfered with. This proposition is believed to be firmly settled. Even if this Court were not bound by its prior decisions, the same result would be reached. Under the ordinary maritime rule, a lien attaches to a vessel at fault for a collision. There is no basis, either on the ground of prerogative or of public policy, for making an exception of vessels owned by the United States and used for public purposes. As stated in *The Davis, supra*, the very fact that the party injured is without remedy, in the absence of a special act of Congress, is a good reason for holding that such a lien exists.

Nor is the fact that a lien might not be presently enforcible an argument against its existence. *The Siren*, 7 Wall. 152, 156-158.

III.

The act of March 9th, 1920, is an express recognition by Congress that a maritime lien may exist against a public vessel even though used solely for governmental purposes and as the United States has secured the release of the "Carolinian" under this Act it cannot now contend that the court is without jurisdiction.

In a discussion of the Act of March 9th, it will be necessary to refer briefly to its history and purpose.

The original Shipping Act of September 9th, 1916, contained a clause relating to vessels purchased, chartered or leased from the Shipping Board as follows:—

> "Such vessels while employed solely as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien or other interest therein".

This clause came before this Court for interpretation in *The Lake Monroe*, 250 U. S. 246. In that case a libel *in rem* for a collision had been filed against the *Lake Monroe*, a vessel which had been requisitioned for title by the United States under the provisions of the Act of June 15, 1917. At the time of the collision the *Lake Monroe* was employed under charter to private persons in carrying a cargo of coal to New England. The United States claimed immunity from process, arguing that the provisions of Section 9 of the Shipping

Act were limited to vessels acquired by the Government under that Act and had no application to vessels requisitioned under the Act of June 15th, 1917. This contention was overruled by this Court and the *Lake Monroe* held subject to attachment.

The decision caused considerable embarrassment to the attorneys for the government. They claimed that although Shipping Board vessels were thereby made subject to libels *in rem*, there was no government official who had authority to give bonds and thus release a vessel which had been attached. As a temporary expedient bonds were given by the Emergency Fleet Corporation, but this proved unsatisfactory as a permanent solution because of a doubt as to the legal authority of the Fleet Corporation to give bonds in all cases.

It was chiefly in order to meet this situation that the Act of March 9th, 1920, was introduced in Congress by the Government.* Section 1 of this Act provides that no vessel owned or in the possession of the United States or of a corporation in which the United States owns the capital stock shall be subject to arrest or seizure. Section 2 of the Act provides for a libel *in personam* against the United States or such corporation in cases where liability would exist against a private party "*provided that such vessel is employed as a merchant vessel or is a tug boat operated by such corporation*". Section 3 of the Act provides that such a suit shall proceed as in like cases between private parties; that the United States shall not be required to give any bonds or stipulations; and that any bond or stipulation previously given

* The Act of March 9, 1920, will be found in the Appendix.

by the Shipping Board or Emergency Fleet Corporation shall be cancelled upon the suggestion of the Attorney General that the United States is interested in the cause and assumes liability to pay any decree that may be entered.

Another problem had also become pressing. During the war the United States had employed a large number of ships in transporting army supplies and other like service. Some of these ships had been requisitioned for title under the Acts of June 15th, 1917; others like the *Carolinian* had been merely taken into government possession. In very many instances collisions had occurred for which damages had been claimed by the owners of the injured vessels. After the Armistice, vessels which had been merely *chartered* were turned back to their owners and vessels *owned* by the United States were put up for sale. It was obvious, in view of the decisions of this Court, that as soon as these vessels went into private hands they would be libelled. It, therefore, became necessary for the government to protect the owners of the vessels which it had chartered, and the intending purchasers of the vessels which it owned. This was the obvious purpose of Section 4 of the Act, which is as follows:—

> "Sec. 4. That if a privately owned vessel not in the possession of the United States or of such corporation is arrested or attached upon any cause of action arising or alleged to have arisen from previous possession, ownership, or operation of such vessel by the United States or by such corporation, such vessel shall be released without bond or stipulation therefor upon the suggestion by the United States, through its Attorney General or other duly authorized law officer, that it is interested in such cause, desires such release,

> and assumes the liability for the satisfaction of any decree obtained by the libelant in such cause, and thereafter such cause shall proceed against the United States *in accordance with the provisions of this Act*". (Italics ours.)

The concluding sentence of Section 4 that upon the suggestion by the Attorney General "thereafter such cause shall proceed against the United States in accordance with the provisions of this Act" plainly incorporates in Section 4 the provisions of Section 3 as follows:—

> "Sec. 3. That such suits shall proceed and shall be heard and determined *according to the principles of law* and to *the rules of practice obtaining in like cases between private parties.* A decree against the United States or such corporation may include costs of suit, and when the decree is for a money judgment, interest at the rate of 4 per centum per annum until satisfied, or at any higher rate which shall be stipulated in any contract upon which such decree shall be based. Interest shall run as ordered by the court. Decrees shall be subject to appeal and revision as now provided in other cases of admiralty and maritime jurisdiction." (Italics ours.)

It is obvious that the incorporation of Section 3 in Section 4 defeats the Government's contention that the Court was without jurisdiction because a lien is asserted against a government vessel. This would not be "according to the principles * * * obtaining in like cases between private parties." There is no provision in the Act entitling the United States, after appearing under Section 4, to raise objection to the Court's jurisdiction. If the United States appears under Sec-

tion 4 it must appear generally, and the Court will then proceed as if the suit were between private parties. That this was the intention of Congress is further shown by the provisions of Section 7 of the Act which authorizes the giving of a bond in case a Shipping Board vessel is arrested *in a foreign country.* The concluding sentence of Section 7 is "that nothing in *this* section shall be held to prejudice or preclude a claim of the immunity of such vessel or cargo from foreign jurisdiction in a proper case." Clearly a like clause was advisedly omitted from Section 4 because Congress intended that cases in which the government intervened under Section 4 should be tried without resort to the technical doctrine of governmental immunity.

It will further be noted that Section 4 is not limited to liabilities incurred by ships operating as "merchant vessels" as is provided in Section 2 of the Act. On the contrary, Section 4 applies to liabilities arising "from previous possession, ownership or operation of such vessel by the United States," without qualification. In view of the fact that at the time of the passage of the Act it was well known that many claims had been presented for damages incurred while Shipping Board vessels were employed in carrying troops and supplies to France, this is extremely significant.

The Act was discussed at length by its draftsman, Mr. Ira A. Campbell, before the Committee on the Judiciary of the House of Representatives (66th Congress, First Session, Hearing on H. R. 7124, Serial 4, August 26, 1919). Mr. Campbell had been Admiralty Counsel of the United States Shipping Board from May 1, 1918, to August 1, 1919, and at the time of the hearing was Special

Assistant to the Attorney General in Admiralty matters. After stating the purposes of the first three sections substantially as above, he read what is now section 4 of the Act, and continued:

> "That is a special provision which is intended to meet a situation which has developed out of the war. The Government has had under requisition a large number of privately owned vessels. We have had them under requisition under two forms of charter parties, technically known as time form and bare boat form. Under a time form, the owner furnished the crew and the Government furnished the fuel; that is the chief distinction. Under the bare boat form, the Government took the bare boat over and managed and operated the vessel itself. Under the time form the Government assumed the war risks but did not assume the marine risks, so that if a requisitioned vessel operating under a time form was in collision as a result of negligence in navigation, the risk of collision was carried by the owner of the vessels and undoubtedly insured against by private underwriters. The Government carried the war risk. When the board took over vessels on the bare boat form and managed and operated them, the Government assumed all the risks, both war and marine risks.
>
> For example, we have two actual cases existing in the Department of Justice at the present time. The Association Oil tanker, *Frank H. Buck*, was requisitioned by the Government and taken over on the bare-boat form, and was turned over to the Navy Department by the Shipping Board, and operated by the Navy Department as an oil tanker. While so operating she was in collision with a Standard Oil tanker which was under a time form, where the owner was carrying the liability. While the *Frank H. Buck* was in the possession of the United States, she could not be

attached or libeled, *but the moment that she came out of the possession of the United States and went back into the possession of the Associated Oil Co., she became subject to libel on the part of the Standard Oil Co., under a decision of the Supreme Court of the United States.* (*The Siren*, 7 Wall. 152.) And she has been so attached. After it was delivered back to the Associated Oil Co. the Standard Oil Co. libeled the ship at Los Angeles, Calif. Under the form of charter party the Government has got to assume that liability.

What I am providing here is that when a case of that kind arises, where a privately owned vessel out of the possession of the United States is arrested in any suit *in rem* (or) attached in any suit *in personam*, such vessel shall be immediately released without bond or stipulation being required therefor, upon the Government intervening and assuming responsibility for any liability arising in such suit. So that if when the *Frank H. Buck* was libeled at Los Angeles, the Government had wanted to admit its liability, responsibility for the liability arising out of the collision, then under this section, it could have gone into the United States District Court at Los Angeles and said, 'We assume responsibility for this collision,' and thereupon the court would have ordered a release of the vessel without compelling the Government to give bond" (p. 18—Italics ours).

It is plain that at this time, at least, the legal advisers of the Government did not contend that no collision lien could exist against a vessel employed in public service.

The plain language of the Act is that if the government intervenes in a suit for collision or other suit *in rem* under Section 4, the case shall be tried

as if it were a suit between private parties. If the United States takes the benefit of the Act, and secures the release of a vessel without giving bond, it must also assume the burden.

The provisions of Sections 3 and 4 of the Act are entirely consonant with the decisions of this Court cited in the first and second divisions of this brief. Congress has unquestionably recognized the rule that a vessel "by whomsoever owned and navigated" is subject to maritime liens; it was cognizant of the fact that many such liens had been created against vessels owned or in the possession of the United States and employed in naval or military service; and it was to protect the owners and purchasers of such vessels and to place a liability upon the government which it was its duty to bear, that Section 4 was enacted.

IV.

Reply to Brief Submitted on Behalf of the United States.

(1) On page 12 of the brief submitted on behalf of the United States, reference is made to the fact that on several occasions requests have been made to Congress to subject public vessels to the liability of merchant vessels and to provide remedies for the enforcement thereof. It is then stated:

> "After thorough consideration, Congress refused to subject public vessels to the Admiralty jurisdiction or to grant a remedy *in personam* against the Government."

This statement is incorrect. The actual facts are that when the Act of March 9, 1920, was presented on the floor of the House, it was sought to amend the Act so as to make it specifically applicable to all Government vessels, even though not employed as merchant vessels (Congressional Record, 66th Congress, 2nd Session, Vol. 59, p. 1759). The amendment was objected to on the point of order that it was not germane to the subject of the bill (Congressional Record, Vol. 59, p. 1828) and after considerable discussion the Chairman ruled that the point of order was well taken and the amendment was accordingly ruled out (Congressional Record, Vol. 59, p. 1832). This obviously determined nothing as to the merit of the amendment.

Thereafter an original bill was introduced in the House of Representatives which specifically authorized the bringing of suits for collision against the United States, even where non-commercial vessels were concerned. This bill is referred to at page 32 of our brief, and, as there stated, it has been favorably reported by the Committee on the Judiciary. The purpose of the bill is stated in the report of the Committee, as follows:

> "The chief purpose of this bill is to grant private owners of vessels and of merchandise a right of action when their vessels or goods have been damaged as a result of a collision with any Government-owned vessel, without requiring an application to Congress, in each particular instance, for the passage of a special enabling act" (66th Congress, 3rd session, Report No. 1301, pp. 1, 2).

As already stated, this bill has been endorsed by the various departments of the Government and

by the Committee on the Judiciary, and should be passed as soon as reached on the calendar.

While the Department of Justice may feel compelled to submit the question involved in the test cases, for the final decision of this Court, it is not inappropriate, perhaps, to state that the other Departments of the Government are actually in favor of allowing suits against the United States in *all* cases of collision involving public vessels. The attitude of those Departments was clearly shown during the hearing before the Committee on the Judiciary of the House of Representatives, to which reference is made in the Government's brief. This testimony is referred to in the favorable report submitted by the House Committee on the Judiciary (66th Cong., 3rd Session, House of Representatives Report No. 1301), from which report the following is quoted:

> "Upon the hearing before the committee held November 13, 1919, the Navy Department was represented by the assistant solicitor of the department, Mr. Albert E. Shoemaker. Mr. Shoemaker sets forth, compactly, both the sympathy of the department with such legislation and the situation which to-day confronts private owners:
>
> > " 'Mr. Chairman and gentlemen of the committee, the Navy Department is in position to thoroughly sympathize with the shippers [shipowners ?] in pressing for this legislation. Since the beginning of the war collisions involving Government vessels, and I might say naval vessels, have increased probably 1,000 per cent. The department has no authority to pay claims arising out of collisions involving naval vessels or vessels operated by the Navy, and there are no appropriations available to pay such claims. There is a

law, however, upon the statute books, enacted June 24, 1910, which authorizes the Secretary of the Navy to adjust and determine the amounts that may be due on collision claims when such amounts are not in excess of $500. Under that law quite a large number of claims of that character are referred to Congress from time to time for appropriations.

" 'A claim in excess of $500 requires a special act of Congress.'

"In the course of Mr. Shoemaker's argument the committee requested that the Navy Department submit a written statement of its official view, and on December 2, 1919, Hon. Franklin D. Roosevelt, Acting Secretary, wrote the chairman of the committee, in part, as follows:

" 'It is understood that at the hearing before your committee it was urged by the private shipping interests that section 2 be amended, so as to make war vessels subject to libel *in personam* as in case of cargo and passenger-carrying vessels, as therein provided. It is believed that no reasonable objection can be offered against such amendment provided that certain other amendments * * * be incorporated in the bill.

" 'Heretofore the department has adjusted and referred to Congress many claims arising out of damages caused to privately owned property by war vessels, under the provisions of the law of June 24, 1910 (36 Stat. L. 607), and it has recommended favorable action on a number of bills introduced in Congress for the purpose of authorizing claimants to bring action against the United States to recover sums of money as damages resulting from collisions involving war vessels. It seems there should be no distinction made between commerce or passenger-

carrying vessels and war vessels when the question of liability for damages caused is involved.'

"The War Department was represented at the hearing on November 13, 1919, by Brig. Gen. Frank T. Hines, Chief of the Transportation Service. His attitude was that, if the department was safeguarded from interruption in the movement of its vessels, there would be no objection to providing a means for 'promptly settling any just claims against the department.' From his argument the following is quoted:

"'* * * if there is no intent to infringe upon the authority which the Executive has in time of war, and nothing that would tie the hands of the United States in promptly conducting its necessary operations in an emergency, certainly we could have no objection. * * *

"'MR. IGOE: If this is put upon the same basis as a proceeding, for instance, in the Court of Claims on a contract against the Government, interfering no more with your operations than such a proceeding would, could there be any objection then from the standpoint of the actual working and conduct of the business of the War Department? I am not referring now to the additional work that would be put upon the officers in the way of defending suits, but I am referring especially to the operations of moving supplies, troops, etc.

"'GEN. HINES: Just so the department is able to move a vessel when it wishes. That is the important thing. I feel sure that the department would certainly have no objection to providing a means of promptly settling any just claims against the department or any other agencies that were involved, but most certainly it would be very inexpedient to tie our hands in any way.'

"The Department of Justice was represented at said hearing by Mr. La Rue Brown. Mr. Brown made it perfectly clear that the Department of Justice had no objection to make such legislation, on principle (serial 8, pp. 9 and 16):

> " 'The interest of the Department of Justice is limited solely to the efficient and economic conduct of the business especially submitted to it, namely, the defense of the interests of the United States in such litigations as may be brought, and it has no interest in any question of policy with respect to the inclusion of the liability of ships, other than these merchant ships, or any other question of general policy. Those, it conceives, are questions for the Shipping Board, private interests, for the War and Navy Departments, and for the State Department.
> * * *
>
> " 'This question of whether other public vessels of the United States should be made subject to process in the same manner as are those of the merchant fleet, is, of course, exactly one of the questions upon which I do not feel authorized to express any view. I would say, of course, from our point of view we have no objections to make. We would accept without question the judgment of the departments on the Government's interest and be content with whatever disposition is made by the Committee.'

"The United States Shipping Board was represented at the hearing by Mr. Charles F. Dutch, admiralty counsel of the board. Like Mr. Brown, Mr. Dutch did not feel justified in expressing, officially, the view of the Shipping Board regarding the proposed amendment, feeling that the question was one for Congress and not for the board. He made perfectly clear, however, what his personal

view was and what his official view would be, if it were proper to express one. He said (serial 8, pp. 45 and 46):

> "'I take it, your hearing is primarily upon this proposed amendment to broaden this bill so that it will extend beyond the vessels in the merchant service to all public vessels. Of course, as to that point I am not authorized to speak officially.
>
> "'I should like to say, as an individual, that we men all realize that one of the worst evils to-day in the halls of legislature is the existence of the private bill. It is pernicious in most any form in which it puts up its head, and in the orderly process of government, as far as I can make out, every witness who has appeared before you to-day has agreed that there must be some solution for a very real difficulty, a very real predicament. * * *'"

(2) On page 14 of his brief the Solicitor General, to our surprise, quotes some extracts from the debates in the House, for the proposition that the Government, even if it appears under Section 4 of the Act of March 9, 1920, may still raise the issue that no maritime lien exists against the vessel libelled because of her public employment at the time of the collision.

The language quoted is directly opposed to the contention of the Solicitor General. Mr. Husted specifically stated, referring to the case of a vessel which, having been in collision while in Government possession and ownership, was thereafter sold by the Government:

> "And the vessel, not now being under the ownership and possession of the Government, *therefore she would be liable as a private ves-*

> *sel and subject to arrest and seizure, just exactly as any other private vessel when sued.* Where the United States is concerned, we provide here by the suggestion of the Attorney General, that the Government will assume responsibility." (Brief on behalf of the United States, p. 15. Italics ours.)

Thus, far from suggesting that the Attorney General could claim immunity after intervening under Section 4, Mr. Husted asserted unqualifiedly that such a vessel was subject to a lien, the responsibility for the discharge of which would be assumed by the United States by its intervention.

(3) At pages 16 and 17 of his brief, the Solicitor General cites a number of decisions for the proposition that at the time of the collision the *Carolinian* was a vessel "belonging to the Government." The cases cited hold that *within the meaning of certain contracts and statutes,* vessels which have been chartered on a bare boat basis are to be considered as "belonging to" the charterer. No case can, of course, be found holding that a bare boat charter changes the property in a vessel.

In *Baltimore Dry Dock & Shipbuilding Company* v. *N. Y. & Porto Rico Steamship Co.,* 262 Fed. 485, the United States had conveyed a site for a dry dock subject to its right to use the dry dock "at any time for the prompt examination and repairing of vessels belonging to the United States, free from charge for docking." The question before the court was whether the United States was bound to pay dockage charges for the use of the dry dock by the s/s *Isabela,* which, although privately owned, was under a demise charter by requisition to the United States. In holding that the *Isabela* fell within the terms of the Government

exemption, the court pointed out that the words "belonging to" were susceptible of different meanings and stated that "It is but fair to assume that it was the purpose of the representatives of the Government to at least secure the free use of these dry docks for all ships being operated under its" (the Government's) "exclusive control" (262 Fed., pp. 487, 488).

In *The Master, Wardens and Assistants of the Trinity House* v. *Clark*, 4 M. & S. 288 (King's Bench 1815), the defendant had executed a demise charter of his ship to the Commissioners of the transport service on behalf of the Crown. It was held that as the ship was in the possession of the Crown by the demise, defendant was not liable to pay lighthouse duties, etc., to the Master of Trinity House.

In *The Sarpen*, L. R. 1916, P. D. 306, the action was for salvage, brought by the owners of the tug *Simla* against the steamer *Sarpen*. At the time the salvage services were rendered, the *Simla* was under a requisition charter to the British Government, the terms of which did not amount to a demise. It was held that the owners of the *Simla* were entitled to recover salvage; that the *Simla* was not a ship "belonging to His Majesty" within the meaning of Section 567 of the Merchant Shipping Act, which prevents the recovery of salvage when services are rendered by Government owned ships.

In *The Matti*, L. R. 1918, P. D. 314, a German steamship had been seized as prize in a British port on the outbreak of war. Under a decree of the Prize Court she was ordered to be detained until the conclusion of peace or further order. She was subsequently delivered to the Lords Commissioners of the Admiralty in accordance with

the Prize Court rules. While in the service of the Admiralty and in September, 1917, she rendered salvage services. It was held that she was a ship belonging to His Majesty within the meaning of Section 557 of the Merchant Shipping Act and that accordingly the Admiralty could not claim salvage.

In *Admiralty Commissioners* v. *Page,* L. R. 1919, 1 K. B. 299, a tug had been requisitioned by the British Admiralty upon terms which amounted to a demise. During the requisition and in January, 1917, the tug rendered salvage services to another vessel. The Merchant Shipping (Salvage) Act 1916, provided:

> "Where salvage services are rendered by any ship belonging to His Majesty and that ship is * * * a tug, the Admiralty shall * * * be entitled to claim salvage."

It was held that the tug was a "ship belonging to His Majesty," within the meaning of the Merchant Shipping (Salvage) Act 1916, and that therefore the Admiralty and not the owners of the tug were entitled to the salvage award.

In *Thorp* v. *Hammond,* 12 Wall. 408, the general owners of a ship had turned her over for management to one of their number under an agreement by which he, in effect, became charterer of the vessel without the management, control, restraint or possession of the other owners. The question before the court was whether in a collision action the other owners could be held liable. On this point the Supreme Court was equally divided. In the opinion, the owner who actually operated the vessel is spoken of as owner "*pro hac vice.*" This is, of course, merely a figurative way of expressing the thought that a charterer by

demise is in possession and has many of the rights of an owner.

In *The Barnstable*, 181 U. S. 464, 468 (cited *supra*, pages 8, 9), this Court quotes Revised Statutes, Section 4286, as follows:

> "The charterer of any vessel, in case he shall man, victual and navigate such vessel at his own expense, or by his own procurement, shall be deemed the owner of such vessel within the meaning of the provisions of this title relating to the limitation of the liability of owners of vessels; and such vessel, when so chartered, shall be liable in the same manner as if navigated by the owner thereof."

The provisions of the statute show that Congress was of the opinion that a charterer by demise was not in fact the "owner" and the statute therefore expressly states that, so far as regards the right to limit liability, a charterer by demise shall be *deemed* the owner.

The question in the case at bar is not whether a vessel under demise charter may be properly considered as "belonging to" or "owned by" the charterer, *within the meaning of contracts or statutes.* It will not be contended that a charter by demise is equivalent to a sale of the ship, vesting the ownership in the charterer. A charter by demise is, of course, merely a bailment of the ship to the charterer, which does not transfer the title to the property bailed (See article on Bailments, 6 Corpus Juris, p. 1084). There was therefore merely a transfer of the *possession* of the *Carolinian* and no authority has been, or could be, cited for the proposition that private property, even though in Government possession, is immune from maritime liens.

An illustration will show the absurdity to which the proposition contended for by the Government leads. Suppose that after the collision and as a consequence thereof, salvage services had been rendered to the *Carolinian*, and further assume that she had on board cargo belonging to private individuals, which cargo would, of course, be in the possession of the United States as bailee. Surely it would not be argued that the salvage lien did not attach to this private property even though it was in the Government's possession when the services were rendered.

(4) At page 17 of the brief, the Solicitor General cites *Bigby* v. *United States*, 188 U. S. 400, *Langford* v. *United States*, 101 U. S. 341, and *Gibbons* v. *United States*, 8 Wall. 269.

These cases are not at all in point.

In *Bigby* v. *United States*, the plaintiff had been injured through the fall of an elevator in the Post Office Building in New York. It was held that the action did not fall within the jurisdiction of the Court of Claims because the case was one "sounding in tort."

In *Langford* v. *United States*, 101 U. S. 341, the suit was brought to recover for the use and occupation of certain lands and buildings. It was held that any claim that might exist against the United States was based upon a tortious taking and accordingly that the Court of Claims had no jurisdiction.

Gibbons v. *United States* was an action against the United States in contract for the sale of a quantity of oats. This Court held that the Court of Claims had jurisdiction except as to one item which it declared was based on tort.

(5) The decision in *United States* v. *Ansonia Brass & Copper Co.*, 218 U. S. 452, *Board of Commissioners* v. *O'Connor*, 86 Ind. 531 and *Rowley* v. *Conklin*, 89 Minn. 172, cited p. 18, hold merely that mechanics' and laborers' liens cannot be enforced against public property.

The case of *The Fidelity*, 16 Blatch, 569, has already been discussed *supra* (pp. 24-26). The *dicta* of Waite, C. J., have always been disregarded in the many subsequent decisions which have dealt with the question (including the cases now before this Court).

The quotations made from *The Parlement Belge* (4 Asp. M. C. 234) at page 20 of the brief submitted by the Solicitor General, show, at the most, that the question was left open whether a maritime lien for collision could exist against a public vessel.

(6) At pages 21-26 it is suggested that the well settled rule as to maritime liens does not apply except to commercial vessels. There is no shred of authority for such a distinction and it is directly in the teeth of the overwhelming weight of authority and of the principle, often enunciated by this Court, that "the ship, *by whomsoever owned* or navigated, is considered as herself the wrongdoer, liable for the tort and *subject to a maritime lien for the damages.*" (*The John G. Stevens*, 170 U. S. 120).

And this argument rests upon the fanciful assumption that the *Carolinian*, at all times a privately owned merchant vessel, *acquired a new personality* after the termination of her charter to the United States. (Brief on behalf of the U. S., p. 24).

(7) At page 27, the Solicitor General attempts to distinguish *The Davis*, 10 Wall., 15, *Long* v.

Tampico, 16 Fed. 491, and *The Johnson Lighterage Co. #24,* 231 Fed. 365, on the ground that these were cases where a maritime lien was based on contract and not on tort.

This distinction is wholly inadmissible.

In *The Davis,* a suit *in rem* for salvage was sustained against property belonging to the United States. It is true that the United States, by statute, permitted suit to be brought against it for contract claims in the Court of Claims. No statute, however, had declared that a *maritime lien* could be created against Government property, even in cases of contract. Nevertheless, this Court held that the general maritime law applied and that a lien had in fact been created against the property of the Government.

The attempted distinction of *Long* v. *Tampico* and the *Johnson Lighterage Company* case has even less justification. In both of these cases it was held that maritime liens for salvage arose against public property of foreign governments,—in *Long* v. *Tampico* the property involved being a Revenue Cutter, and, in the *Johnson Lighterage* case, munitions of war. The decisions cannot be based on any waiver of immunity by the respective foreign governments because there was nothing to show that either Mexico or Russia had waived immunity even as to contract claims. Nevertheless, the courts held that the maritime law applied; that liens had been created and were enforcible.

(8) At pages 27 and 28, the Solicitor General discusses the question as to whether the inability to bring suit against the sovereign is based upon an absence of remedy or an absence of right.

As we have already pointed out (page 18), this question does not arise. The libelant's case is based upon the principle that a vessel "by whomsoever owned or navigated" is liable *in rem* for her misdoings. Inasmuch, therefore, as the *Carolinian's* navigators were at fault and as the *Carolinian* was subject to attachment when the libel was filed, the libellant's case is made out.

In connection with the Solicitor General's argument, however, it may not be amiss to point out that in fact the non-liability of the sovereign is based upon an absence of remedy and not upon a lack of cause of action. The immunity of a sovereign from suit goes back to the feudal days when the Court was held by the King in person. The origin of the rule is stated in Pollock & Maitland's History of English Law, Vol. 1, page 502, as follows:

> "He" (the King) "cannot be compelled to answer in his own court, but this is true of every petty lord in every petty manor; that there happens to be in this world no court above his court is, we may say, an accident."

Judge Cooley, in his well known treatise on Torts (3rd Edition, Vol. I, page 208), said:

> "Even the State or the General Government may be guilty of individual wrongs; for while each is a sovereignty, it is a corporation also, and as such capable of doing wrongful acts. The difficulty here is with the remedy, not with the right. No sovereignty is subject to suits, except with its own consent. But either this consent is given by general law, or some tribunal is established with power to hear all just claims. Or if neither of these is done, the tort remains."

(For interesting discussions of the question, see 30 Harvard Law Review, 20, 32 Harvard Law Review, 447, cited by the Solicitor General, p. 28.)

Congress has, in fact, recognized that a tort *liability* exists by the frequent passage of special acts, and by authorizing the Secretary of the Navy to settle collision claims for small amounts (*supra*, pp. 28, 29).

(9) At pages 28 to 34, the Solicitor General attempts to distinguish *The Siren*, 7 Wall. 152, and *Workman* v. *City of New York*, 179 U. S. 552.

With regard to *The Siren*, the brief of the Solicitor General conveys the impression that although she was in the possession of the United States, she remained in enemy ownership at the time of the collision. This is in direct conflict with the decision which reads (7 Wall., at page 162):

> "Here, however, the title was divested from the previous owner *by the capture*, that being lawful, and vested in the United States (in trust as to one-half for the captors), although the legality of the capture was not established until the sentence of condemnation." (Italics ours.)

Further distinction is sought to be made on the ground that "The Government, as actor, sought the distribution of the fund" (Brief, p. 31). This is obviously immaterial because what was actually decided in *The Siren* was that a maritime lien was created against the vessel by the collision. It should, moreover, be pointed out that in the case at bar it is the Government which is the actor in a suit solely between private parties. The libelant

has not brought suit against Government property or against the Government *in personam*. Any questions as to jurisdiction have resulted solely because of the Government's unsolicited intervention.

For further discussion of *The Siren*, see *supra*, pages 24, 25.

The principles stated by this Court in *Workman* v. *City* cannot be dismissed as mere *obiter dicta*. That case is consonant with all of the prior authorities and has been consistently followed ever since. While there was a dissent from the majority opinion (on the ground that a municipal corporation should not be liable *in personam* for negligence in the performance of a governmental act) there was no dissent from the propositions as to maritime liens laid down in the opinion of the Court.

V.

The order to show cause should be discharged and the petition dismissed.

HAIGHT, SMITH, GRIFFIN & DEMING,
BROWN, MARSHALL, BRUNE & PARKER,
Attorneys for Respondents.

CHARLES S. HAIGHT,
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Appendix.

AN ACT AUTHORIZING SUITS AGAINST THE UNITED STATES IN ADMIRALTY, SUITS FOR SALVAGE SERVICES, AND PROVIDING FOR THE RELEASE OF MERCHANT VESSELS BELONGING TO THE UNITED STATES FROM ARREST AND ATTACHMENT IN FOREIGN JURISDICTIONS, AND FOR OTHER PURPOSES.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall hereafter, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possession: *Provided,* That this Act shall not apply to the Panama Railroad Company.

SEC. 2. That in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tug boat operated by such corporation. Such suits shall be brought in the district court of the United States for the

district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross-libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States.

Sec. 3. That such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice of obtaining in like cases between private parties. A decree against the United States or such corporation may include costs of suit, and when the decree is for a money judgment, interest at the rate of 4 per centum per annum until satisfied, or at any higher rate which shall be stipulated in any contract upon which such decree shall be based. Interest shall run as ordered by the court. Decrees shall be subject to appeal and revision as now provided in other cases of admiralty and maritime jurisdiction. If the libelant so elects in his libel the suit may proceed in accordance with the principles of libels in rem wherever it shall appear

that had the vessel or cargo been privately owned and possessed a libel in rem might have been maintained. Election so to proceed shall not preclude that the libelant in any proper case from seeking relief in personam in the same suit. Neither the United States nor such corporation shall be required to give any bond or admiralty stipulation on any proceeding brought hereunder. Any such bond or stipulation heretofore given in admiralty causes by the United States, the United States Shipping Board, or the United States Shipping Board Emergency Fleet Corporation, shall become void and be surrendered and canceled upon the filing of a suggestion by the Attorney General or other duly authorized law officer that the United States is interested in such cause, and assumes liability to satisfy any decree included within said bonds or stipulation, and thereafter any such decree shall be paid as provided in section 8 of this Act.

Sec. 4. That if a privately owned vessel not in the possession of the United States or of such corporation is arrested or attached upon any cause of action arising or alleged to have arisen from previous possession, ownership, or operation of such vessel by the United States or by such corporation, such vessel shall be released without bond or stipulation therefor upon the suggestion by the United States, through its Attorney General or other duly authorized law officer, that it is interested in such cause, desires such release, and assumes the liability for the satisfaction of any decree obtained by the libelant in such cause, and thereafter such cause shall proceed against the United States in accordance with the provisions of this Act.

Sec. 5. That suits as herein authorized may be brought only on causes of action arising since April 6, 1917, provided that suits based on causes of action arising prior to the taking effect of this Act shall be brought within one year after this Act goes into effect; and all other suits hereunder shall be brought within two years after the cause of action arises.

Sec. 6. That the United States or such corporation shall be entitled to the benefits of all exemptions and of all limitations of liability accorded by law to the owners, charterers, operators, or agents of vessels.

Sec. 7. That if any vessel or cargo within the purview of sections 1 and 4 of this Act is arrested, attached, or otherwise seized by process of any court in any country other than the United States, or if any suit is brought therein against the master of any such vessel for any cause of action arising from, or in connection with, the possession, operation, or ownership of any such vessel, or the possession, carriage, or ownership of any such cargo, the Secretary of State of the United States in his discretion, upon the request of the Attorney General of the United States, or any other officer duly authorized by him, may direct the United States consul residing at or nearest the place at which such action may have been commenced to claim such vessel or cargo as immune from such arrest, attachment, or other seizure, and to execute an agreement, undertaking, bond, or stipulation for and on behalf of the United States, or the United States Shipping Board, or such corporation as by said court required, for the release of such vessel or cargo, and for the prosecution of

any appeal; or may, in the event of such suits against the master of any such vessel, direct said United States consul to enter the appearance of the United States or of the United States Shipping Board, or of such corporation, and to pledge the credit thereof to the payment of any judgment and cost that may be entered in such suit. The Attorney General is hereby vested with power and authority to arrange with any bank, surety company, person, firm, or corporation in the United States, its Territories and possessions, or in any foreign country, to execute any such aforesaid bond or stipulation as surety or stipulator thereon, and to pledge the credit of the United States to the indemnification of such surety or stipulator as may be required to secure the execution of such bond or stipulation. The presentation of a copy of the judgment roll in any such suit, certified by the clerk of the court and authenticated by the certificate and seal of the United States consul claiming such vessel or cargo, or his successor, and by the certificate of the Secretary of State as to the official capacity of such consul, shall be sufficient evidence to the proper accounting officers of the United States, or of the United States Shipping Board, or of such corporation, for the allowance and payment of such judgments: *Provided, however,* That nothing in this section shall be held to prejudice or preclude a claim of the immunity of such vessel or cargo from foreign jurisdiction in a proper case.

Sec. 8. That any final judgment rendered in any suit herein authorized, and any final judgment within the purview of sections 4 and 7 of this Act, and any arbitration award or settlement had and agreed to under the provisions of section 9 of this

Act, shall, upon the presentation of a duly authenticated copy thereof, be paid by the proper accounting officers of the United States out of any appropriation or insurance fund or other fund especially available therefor; otherwise there is hereby appropriated, out of any money in the Treasury of the United States not otherwise appropriated, a sum sufficient to pay any such judgment or award or settlement.

Sec. 9. That the Secretary of any department of the Government of the United States, or the United States Shipping Board, or the board of trustees of such corporation, having control of the possession or operation of any merchant vessel are, and each hereby is, authorized to arbitrate, compromise, or settle any claim in which suit will lie under the provisions of section 2, 4, 7, and 10 of this Act.

Sec. 10. That the United States, and the crew of any merchant vessel owned or operated by the United States, or such corporation, shall have the right to collect and sue for salvage services rendered by such vessel and crew, and any moneys recovered therefrom by the United States for its own benefit, and not for the benefit of the crew, shall be covered into the United States Treasury to the credit of the department of the Government of the United States, or of the United States Shipping Board, or of such corporation, having control of the possession or operation of such vessel.

Sec. 11. That all moneys recovered in any suit brought by the United States on any cause of ac-

tion arising from, or in connection with, the possession, operation, or ownership of any merchant vessel, or the possession, carriage, or ownership of any cargo, shall be covered into the United States Treasury to the credit of the department of the Government of the United States, or of the United States Shipping Board, or of such aforesaid corporation, having control of the vessel or cargo with respect to which such cause of action arises, for reimbursement of the appropriation, or insurance fund, or other funds, from which the loss, damage, or compensation for which said judgment was recovered has been or will be paid.

Sec. 12. That the Attorney General shall report to the Congress at each session thereof the suits under this Act in which final judgment shall have been rendered for or against the United States and such aforesaid corporation and the Secretary of any department of the Government of the United States, and the United States Shipping Board, and the board of trustees of any such aforesaid corporation, shall likewise report the arbitration awards or settlements of claims which shall have been agreed to since the previous session, and in which the time to appeal shall have expired or have been waived.

Sec. 13. That the provisions of all other Acts inconsistent herewith are hereby repealed.

Approved, March 9, 1920.

of March 9, 1920,[1] is the United States liable for a collision committed by a vessel while owned by it absolutely or *pro hac vice* and employed by it in public and government purposes. P. 431.

2. *Held*, that a vessel owned by the United States, assigned by the United States Shipping Board to the War Department, manned by a navy crew and engaged in transporting foodstuffs provided by the Government for the relief of the civilian population of Europe after the Great War, to be paid for by the buyer, was not a merchant vessel but a vessel engaged in a public service; and that two others, while let or chartered to the United States on a bare-boat basis and devoted to military and naval uses were also of public status. P. 431.

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[1] Pertinent parts of the statutes above mentioned are as follows:

C. 451, § 9, 39 Stat. 730. "That any vessel purchased, chartered, or leased from the [United States Shipping] board may be registered or enrolled and licensed, or both registered and enrolled and licensed, as a vessel of the United States and entitled to the benefits and privileges appertaining thereto. . . .

"Every vessel purchased, chartered, or leased from the board shall, unless otherwise authorized by the board, be operated only under such registry or enrollment and license. Such vessels while employed solely as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein. No such vessel, without the approval of the board, shall be transferred to a foreign registry or flag, or sold; nor, except under regulations prescribed by the board, be chartered or leased. . . ."

C. 95, § 4, 41 Stat. 525, 526. "That if a privately owned vessel not in the possession of the United States or of such [United States Shipping Board Emergency Fleet] corporation is arrested or attached upon any cause of action arising or alleged to have arisen from previous possession, ownership, or operation of such vessel by the United States or by such corporation, such vessel shall be released without bond or stipulation therefor upon the suggestion by the United States, through its Attorney General or other duly authorized law officer, that it is interested in such cause, desires such release, and assumes the liability for the satisfaction of any decree obtained by the libelant in such cause, and thereafter such cause shall proceed against the United States in accordance with the provisions of this Act."

3. The maritime law is part of the law of the country only in so far as the United States has made it so, and binds the United States only in so far as the United States has consented. P. 432.
4. The United States has not consented to be sued for torts and therefore it cannot be said that, in a legal sense, the United States has been guilty of a tort. P. 433.
5. This immunity extends to public vessels of the United States, at least while employed in operations of government; and liability for a tort cannot be fastened upon them by the fiction of a ship's personality, to lie dormant while they remain with the Government and to become enforceable when they pass into other hands. P. 433. *The Siren*, 7 Wall. 152, and *Workman* v. *New York City*, 179 U. S. 552, distinguished.
6. Prohibition lies to restrain the District Court from exceeding its jurisdiction in admiralty cases. P. 434.

Rule absolute for writs of prohibition.

PETITIONS by the United States for writs of prohibition and mandamus to prevent District Courts from exercising jurisdiction in three proceedings *in rem* for collisions that occurred while the vessels libeled were owned absolutely or *pro hac vice* by the United States and employed in the public service.

Mr. Solicitor General Beck, with whom *Mr. Assistant Attorney General Ottinger* and *Mr. J. Frank Staley*, Special Assistant to the Attorney General, were on the brief, for the United States.

The vessels were all of distinctively public status when the collisions occurred.

Section 9 of the Shipping Act has not waived the immunity of the United States or its vessels from suits *in rem* for losses arising while they are employed in the war service. Both the collision loss and the enforcement of the claim against the vessel must occur while the government vessel is employed solely as a merchant vessel, and then is operating for the account of others than the Government, under charter or lease.

The filing of suggestions under § 4 of the Suits in Admiralty Act only determines the United States as

claimant for the vessel and substitutes its credit for the payment of the decree finally entered, if any, instead of the usual bond or stipulation for value otherwise entered to secure the release of a vessel from attachment. The proceedings continue as proceedings *in rem*. Manifestly, if the libel does not state a cause of action, *in rem* against the vessel, this section can not create one.

Unless there is some magic in such public vessels' personification, the Government can not be held for these torts. There is no distinction between the Government and its property. There should be no relief by indirection where Congress has not provided relief directly. *Bigby* v. *United States*, 188 U. S. 400, 408; *Langford* v. *United States*, 101 U. S. 341, 344; *Gibbons* v. *United States*, 8 Wall. 269, 274. Public vessels are part of the sovereign State and their liabilities are merged in those of the sovereign. *United States* v. *Ansonia Brass Co.*, 218 U. S. 452; *Board of Commissioners* v. *O'Connor*, 86 Ind. 531, 537; *Rowley* v. *Conklin*, 89 Minn. 172; *The Fidelity*, 16 Blatchf. 569, 572, 573; *The Parlement Belge*, 4 Asp. M. C. 234, 237, 241; *The Prins Frederik*, 2 Dods. 451.

The law merchant personified the commercial ship not a public ship. Commercial vessels are sent in trade to all ports. Their owners are usually inaccessible for purposes of suit, and their personal responsibilities are uncertain. The necessities of the vessel's operation in merchant service demand that the vessel, the *res*, shall be responsible for her torts and contracts. The basis of the law governing merchant vessels is aid of commerce. *Vandewater* v. *Mills*, 19 How. 82; *United States* v. *Brig Malek Adhel*, 2 How. 210; *The China*, 7 Wall. 53; *The Eugene F. Moran*, 212 U. S. 466; *The Young Mechanic*, 2 Curtis, 404; Holmes, The Common Law, p. 25; Mayer's Admiralty Law and Practice, p. 8. The reason and the origin of the rule show that it cannot apply to public ships engaged in war service. Cf. *Ex parte New York, No. 1*, 256 U. S. 490.

Sovereign immunity includes immunity from lien liability as well as from process. *Ex parte Muir*, 254 U. S. 522; *Ex parte Hussein Lutfi Bey*, 256 U. S. 616; *Ex parte New York, No. 1*, 256 U. S. 490; *Ex parte New York, No. 2*, 256 U. S. 503; *The Davis*, 10 Wall. 15; *The Tampico*, 16 Fed. 491; *Johnson Lighterage Co.*, 231 Fed. 365; *The Rock Island Bridge*, 6 Wall. 213; *Kawananakoa* v. *Polyblank*, 205 U. S. 349; *Riddoch* v. *State*, 68 Wash. 329; 32 Harv. Law Rev. 447; 30 Harv. Law Rev. 20. *The Siren*, 7 Wall. 152, and *Workman* v. *New York City*, 179 U. S. 552, distinguished. Cf. *Carr* v. *United States*, 98 U. S. 433, 439.

Mr. T. Catesby Jones, with whom *Mr. James W. Ryan* was on the brief, for respondent in No. 21, Original.

The Western Maid was a merchant vessel at the time of the collision. The sale of foodstuffs to enemy aliens is not a necessary function of the sovereign. Indeed, the Act of February 25, 1919, 40 Stat. 1161, indicates the opinion of Congress that it was unwise for the Government to engage in trade with enemy populations. It is doubtful whether it is constitutional for the Government to engage in transporting foodstuffs to be offered for sale at destination. *United States* v. *Strang*, 254 U. S. 491; *United States Shipping Board* v. *Wood*, 274 Fed. 893.

The collision took place two months after the armistice. Under such circumstances, the vessel could in no event be called a vessel engaged in a military operation. The Government has the burden of proof to establish that she was a public vessel engaged in a military operation. *Ex parte Muir*, 254 U. S. 522; *In re Jupp*, 274 Fed. 494, 485.

Even if it were a fact that no freight was to be paid for the carriage, this circumstance would not affect the case. It was intended that her cargo was to be sold to the civilian population of Europe.

There is no suggestion that the vessel was commissioned. *The Exchange*, 7 Cr. 116. On the contrary, the

record shows that she was registered as a merchant ship, and it is to be inferred that she was operating under this registry. Rev. Stats. §§ 4170, 4171; Navigation Laws of the United States, 1919, p. 41.

Congress, by the Suits in Admiralty Act of 1920, has waived immunity as to merchant vessels. In effect this is a suit under that act.

If we assume that the Western Maid was a public vessel at the time of the collision, nevertheless a claim in favor of the libelant was created against her at that time, which could be enforced *in rem*. *The Siren*, 7 Wall. 152; 13 Wall. 389. The Government contends that the language in 7 Wall. 155, 156, 158, is a dictum. When the members of this court, in face of a single dissent, make a doctrine one of the principle grounds for the court's decision, such a doctrine can hardly be called a dictum. The Government suggests that, because the Siren was a prize, the case is distinguishable. This conclusion does not follow. See Lord, Admiralty Claims, 19 Col. Law Rev. 477.

As we view the case, *The Siren* was a decision directly in point. The proposition relied upon by Mr. Justice Nelson as a ground for his dissent (7 Wall. 165), viz, that, if an owner of an offending vessel is not liable, it follows that there can be no lien, is contrary to the decisions in *The China*, 7 Wall. 53; *Ralli* v. *Troop*, 157 U. S. 386; *The Blackheath*, 195 U. S. 361; *Tucker* v. *Alexandroff*, 183 U. S. 424; *The Palmyra*, 12 Wheat. 1; *Brig Malek Adhel*, 2 How. 210; *The John G. Stevens*, 170 U. S. 122; and *The Barnstable*, 181 U. S. 464, 467.

Liability *in rem* is entirely independent of liability *in personam*. *Homer Ramsdell Co.* v. *La Compagnie Générale Transatlantique*, 182 U. S. 406.

Because of the difference between the American and English conceptions of the liability of a ship, the English authorities are not in point. *The Davis*, 10 Wall.

15; *The Carlo Poma*, 259 Fed. 369. But even in England it is settled, as was said in *Workman* v. *New York City*, 179 U. S. 552, that a collision impresses a liability on a public vessel which becomes enforcible when the crown waives the immunity of the public vessel. *The Ticonderoga*, 1 Swab. Adm. Rep. 215; *Fletcher* v. *Braddick*, 2 Bos. & P. 182.

In *Ex parte New York, No. 1*, 256 U. S. 490, this court said that the *Workman Case* dealt with a question of the substantive law of admiralty, not the power to exercise jurisdiction over the person of the defendant.

The doctrine of *The Davis* and *The Siren* has long been familiar to the federal courts. *The Tampico*, 16 Fed. 491; *Thompson Navigation Co.* v. *Chicago*, 79 Fed. 984; *Johnson Lighterage Co.*, 231 Fed. 365; *The Attualita*, 238 Fed. 909; *The Luigi*, 230 Fed. 493; *The Othello*, 5 Blatchf. 343.

The Fidelity, 16 Blatchf. 569, was disapproved in *Thompson Navigation Co.* v. *Chicago*, 79 Fed. 984, and, so far as its dictum indicated a departure from the doctrine of *The Siren* and *The Davis*, was expressly disapproved in *Workman* v. *New York City*, 179 U. S. 552, and in *The Ceylon Maru*, 266 Fed. 396. See also *The U. S. S. Hisko, U. S. S. Roanoke and U. S. S. Pocahontas*, S. D. N. Y., March 17, 1921, Manton, J., (unreported); *The U. S. S. Newark*, S. D. N. Y., March 18, 1921, Knox, J., (unreported); *The U. S. S. Sixaola*, S. D. N. Y., April 21, 1921, Mayer, J., (unreported); *The F. J. Luckenbach*, 267 Fed. 931; *The Liberty* (unreported), now before this court; *The Carolinian*, 270 Fed. 1011. And see *The Florence H*, 248 Fed. 1012; *The Gloria*, 267 Fed. 929; *The City of Philadelphia*, 263 Fed. 234; *United States* v. *Wilder*, 3 Sumner, 308, 312.

The principle that the maritime law extends to public vessels has been recognized by Congress. Act of August 19, 1890, c. 802, 26 Stat. 320; Rev. Stats., § 4233; *The*

Esparta, 160 Fed. 269; *The A. A. Raven*, 231 Fed. 380. Cf. *Admiralty* v. *S. S. Eleanor*, VI Lloyd's List Law Rep. 456.

It cannot be said that the liability arises from the act of the Government in waiving its immunity from suit. It existed before this suit; otherwise there could be no cause of action on which to base the suit. *United States* v. *Ringgold*, 8 Pet. 162; *United States* v. *Lee*, 106 U. S. 196, 206; Lord, Admiralty Claims, 19 Col. Law Rev. 477; Hearings, Senate Committee on Commerce, 66th Cong., 1st sess., on S. 2253, p. 18.

Kawananakoa v. *Polyblank*, 205 U. S. 349, 353, was not a suit in admiralty and the facts were wholly different from those in this case. It was not there intended to modify the doctrine of *The Siren*, *The Davis*, and of the *Ringgold Case*, *supra*.

Mr. Edward E. Blodgett, with whom *Mr. Foye M. Murphy* was on the brief, for respondent in No. 22, Original.

The burden of proving immunity from the lien is upon the petitioner. *The Tampico*, 16 Fed. 491.

The Liberty was subject to a maritime lien arising out of this collision. *The Bold Buccleugh*, 7 Moore P. C. 267; *The China*, 7 Wall. 53; *Ralli* v. *Troop*, 157 U. S. 386; *Briggs* v. *Light Boat*, 7 Allen, 287; *The John G. Stevens*, 170 U. S. 113; Holmes, The Common Law, pp. 26–34; *The Little Charles*, 1 Brock. 347; *The Palmyra*, 12 Wheat. 1; *United States* v. *Brig Malek Adhel*, 2 How. 210; *The John Fraser*, 21 How. 184; *The Merrimac*, 14 Wall. 199; *The Clarita*, 23 Wall. 1; *The Barnstable*, 181 U. S. 464; *The Luigi*, 230 Fed. 493; *Johnson Lighterage Co.*, 231 Fed. 365.

The lien arises though the vessel be owned, manned and operated by a sovereign for war purposes. *United States* v. *Wilder*, 3 Sumner, 308; *The Davis*, 10 Wall. 15;

The Siren, 7 Wall. 152; *Workman* v. *New York City*, 179 U. S. 552; *The Florence H*, 248 Fed. 1012; *The Gloria*, 267 Fed. 929; *The F. J. Luckenbach*, 267 Fed. 931; *The City of Philadelphia*, 263 Fed. 234.

The property of a sovereign is not immune from pre-existing maritime liens. *Briggs* v. *Light Boat, supra; United States* v. *Wilder, supra; The St. Jago de Cuba*, 9 Wheat. 416; *The Copenhagen*, 1 C. Rob. Adm. 289.

The petitioner by the Act of March 9, 1920, has impliedly admitted that a lien may be created upon vessels owned or operated by it.

In England, technical immunity attaches to all property owned by the crown, irrespective of whether or not it is in possession of the sovereign. *The Broadmayne*, L. R. [1916] P. D. 64; *The Scotia*, [1903] A. C. 501. But the Lords Commissioners of the Admiralty represent the crown, and have a discretionary power, freely exercised, to waive the privileges of the crown and consent to jurisdiction. *The Fidelity*, 16 Blatchf. 569; *United States* v. *New York & Oriental S. S. Co.*, 216 Fed. 61; *Thompson Navigation Co.* v. *Chicago*, 79 Fed. 984; *United States* v. *Lee*, 106 U. S. 196, 208; *Homer Ramsdell Co.* v. *La Compagnie Générale Transatlantique*, 182 U. S. 406. Furthermore, the personification of the *res* is not carried so far in England as in the United States. In the former the procedure *in rem* is used merely as a means to compel the appearance of the respondent, and judgment runs against the individual,—the seizure of the *res* is incidental. *The Parlement Belge*, 5 P. D. 197.

Mr. Charles S. Haight, with whom *Mr. Wharton Poor* was on the brief, for respondent in No. 23, Original.

The case of The Carolinian is materially different from that of The Western Maid and other cases, where at the time of the collision title to the ship was in the Government.

The Western Maid was and is the property of the United States. On January 10, 1919, she was allocated by the United States Shipping Board to the War Department for service as a transport. She had been loaded with foodstuffs for the relief of the civilian population of Europe, to be delivered on arrival at Falmouth, England, to the order of the Food Administration Grain Corporation, the consignor, American Embassy, London, care of the Chief Quartermaster, American Expeditionary Forces, France; subject to the direction of Mr. Hoover. If it should prove impracticable to reship or redirect to the territories lately held by the Central Empires, Mr. Hoover was to resell to the Allied Governments or to the Belgian Relief; the foodstuffs to be paid for by the buyer. The vessel was manned by a navy crew. Later on the same day, January 10, 1919, in New York harbor, the collision occurred. On March 20, 1919, the vessel was delivered to the United States Shipping Board. The libel was filed on November 8, 1919. Act of September 7, 1916, c. 451, § 9, 39 Stat. 728, 730. *The Lake Monroe*, 250 U. S. 246. On February 20, 1920, the Government moved that it be dismissed for want of jurisdiction. The District Court overruled the motion. On April 11, 1921, the Attorney General moved for leave to file the present petition in this Court. Leave was granted and the case has been heard.

The Liberty was a pilot boat let to the United States on the bare-boat basis at a nominal rate of hire. She had been manned by a crew from the United States Navy and commissioned as a naval dispatch boat, and was employed to serve military needs in war service. The collision took place on December 24, 1917, while she was so employed, in Boston Harbor. Afterwards the vessel was redelivered to the owners and still later, on February 5, 1921, the suit now in question was brought against her. On February 14, under the Act of March 9, 1920, c. 95, § 4, 41 Stat. 525,

the United States filed a suggestion of its interest, and also set up the above facts. The District Court held that they constituted no defence and this petition was brought by the Attorney General along with that last mentioned.

The Steamship Carolinian had been chartered to the United States upon a bare-boat charter and had been assigned to the War Department, by which she was employed as an army transport and furnished with an army crew. While she was so employed the collision took place in the harbor of Brest, France, on February 15, 1918. Afterwards the Carolinian was returned to the owners, and she was employed solely as a merchant vessel on July 9, 1920, when the suit in question was begun, under which the vessel was seized. In the same month the United States filed a suggestion of interest, and on January 6, 1921, set up the foregoing facts and prayed that the libel be dismissed. The District Court maintained its jurisdiction and this petition was brought by the Attorney General along with the other two. 270 Fed. 1011.

It may be assumed that each of these vessels might have been libeled for maritime torts committed after the redelivery that we have mentioned. But the Act of September 7, 1916, c. 451, § 9, does not create a liability on the part of the United States, retrospectively, where one did not exist before. Neither, in our opinion, is such a liability created by the Act of March 9, 1920, c. 95, § 4, authorizing the United States to assume the defence in suits like these. It is not required to abandon any defence that otherwise would be good. It appears to us plain that before the passage of these acts neither the United States nor the vessels in the hands of the United States were liable to be sued for these alleged maritime torts. The Liberty and the Carolinian were employed for public and government purposes, and were owned *pro hac vice* by the United States. It is suggested that the Western Maid was a merchant vessel at the time of the

EX PARTE IN THE MATTER OF THE UNITED STATES, OWNER OF THE AMERICAN STEAMSHIP "WESTERN MAID," PETITIONER.

EX PARTE IN THE MATTER OF THE UNITED STATES, FORMER REQUISITIONED OR CHARTERED OWNER OF THE AUXILIARY SCHOONER "LIBERTY," PETITIONER.

EX PARTE IN THE MATTER OF THE UNITED STATES, FORMER REQUISITIONED AND CHARTERED OWNER OF THE AMERICAN STEAMSHIP "CAROLINIAN," PETITIONER.

PETITIONS FOR WRITS OF PROHIBITION AND/OR MANDAMUS.

Nos. 21, 22, 23, Original. Argued December 12, 13, 1921.—Decided January 3, 1922.

1. Neither upon general principle nor under § 9 of the Shipping Act of September 7, 1916, or § 4 of the "Suits in Admiralty" Act

collision, but the fact that the food was to be paid for and the other details adverted to in argument cannot disguise the obvious truth, that she was engaged in a public service that was one of the constituents of our activity in the war and its sequel and that had no more to do with ordinary merchandizing than if she had carried a regiment of troops. The only question really open to debate is whether a liability attached to the ships which although dormant while the United States was in possession became enforcible as soon as the vessels came into hands that could be sued.

In deciding this question we must realize that however ancient may be the traditions of maritime law, however diverse the sources from which it has been drawn, it derives its whole and only power in this country from its having been accepted and adopted by the United States. There is no mystic over-law to which even the United States must bow. When a case is said to be governed by foreign law or by general maritime law that is only a short way of saying that for this purpose the sovereign power takes up a rule suggested from without and makes it part of its own rules. *The Lottawanna,* 21 Wall. 558, 571, 572. *Dalrymple* v. *Dalrymple,* 2 Hagg. Cons. 54, 58, 59. Dicey, Conflict of Laws, 2d ed., 6, 7. Also we must realize that the authority that makes the law is itself superior to it, and that if it consents to apply to itself the rules that it applies to others the consent is free and may be withheld. The sovereign does not create justice in an ethical sense, to be sure, and there may be cases in which it would not dare to deny that justice for fear of war or revolution. Sovereignty is a question of power, and no human power is unlimited. *Cariño* v. *Insular Government of the Philippine Islands,* 212 U. S. 449, 458. But from the necessary point of view of the sovereign and its organs whatever is enforced by it as law is enforced as the

expression of its will. *Kawananakoa* v. *Polyblank*, 205 U. S. 349, 353.

The United States has not consented to be sued for torts, and therefore it cannot be said that in a legal sense the United States has been guilty of a tort. For a tort is a tort in a legal sense only because the law has made it so. If then we imagine the sovereign power announcing the system of its laws in a single voice it is hard to conceive it as declaring that while it does not recognize the possibility of its acts being a legal wrong and while its immunity from such an imputation of course extends to its property, at least when employed in carrying on the operations of the Government,—specifically appropriated to national objects, in the language of *Buchanan* v. *Alexander*, 4 How. 20,—yet if that property passes into other hands, perhaps of an innocent purchaser, it may be seized upon a claim that had no existence before. It may be said that the persons who actually did the act complained of may or might be sued and that the ship for this purpose is regarded as a person. But that is a fiction not a fact and as a fiction is the creation of the law. It would be a a strange thing if the law created a fiction to accomplish the result supposed. It is totally immaterial that in dealing with private wrongs the fiction, however originated, is in force. See *Liverpool, Brazil & River Plate Steam Navigation Co.* v. *Brooklyn Eastern District Terminal*, 251 U. S. 48, 53. The personality of a public vessel is merged in that of the sovereign. *The Fidelity*, 16 Blatchf. 569, 573. *Ex parte State of New York, No. 2*, 256 U. S. 503.

But it is said that the decisions have recognized that an obligation is created in the case before us. Legal obligations that exist but cannot be enforced are ghosts that are seen in the law but that are elusive to the grasp. The leading authority relied upon is *The Siren*, 7 Wall. 152.

The ground of that decision was that when the United States came into court to enforce a claim it would be assumed to submit to just claims of third persons in respect of the same subject-matter. 7 Wall. 154. *Carr* v. *United States*, 98 U. S. 433, 438. In reaching its result the Court spoke of such claims as unenforcible liens, but that was little more than a mode of expressing the consent of the sovereign power to see full justice done in such circumstances. It would have been just as effective and more accurate to speak of the claims as ethical only, but recognized in the interest of justice when the sovereign came into court. They were treated in this way by Dr. Lushington in *The Athol*, 1 Wm. Rob. 374, 382. Further distinctions have been taken that need not be adverted to here. There was nothing decided in *Workman* v. *New York City*, 179 U. S. 552, that is contrary to our conclusion, which, on the other hand, is favored by *The Fidelity*, 16 Blatchf. 569, 573, and *Ex parte State of New York, No. 1*, 256 U. S. 490, and *Ex parte State of New York, No. 2*, 256 U. S. 503. The last cited decisions also show that a prohibition may be granted in a case like this. See *The Ira M. Hedges*, 218 U. S. 264, 270.

Rule absolute for writs of prohibition.

Mr. Justice McReynolds did not hear the argument in this case and took no part in the decision.

Mr. Justice McKenna, with whom concurred Mr. Justice Day and Mr. Justice Clarke, dissenting.

The question in the cases is without complexity, and the means of its solution ready at hand. The question is, What is the law applicable to colliding vessels and what remedy is to be applied to the offending one, if there be an offending one? The question, I venture to say, has unequivocal answer in a number of decisions of this court if they be taken at their word. And why should they

419. McKenna, Day, and Clarke, JJ., dissenting.

not be? That they have masqueraded in a double sense, cannot be assumed; that they have successively justified implications adverse to their meaning would be a matter of wonder.

What then do they express to be the law of colliding vessels, the assignment of offence, if offence there be, and how far is it dependent, if at all, upon whether the offender was in public or private service?

The answer may be immediate. This court has kept steadily in mind that the admiralty jurisprudence of the country, as adopted by the Constitution, has a distinctive individuality, and this court has felt the necessity of keeping its principles in definite integrity, and the remedies intact by which its principles can alone be realized. The most prominent and efficient of its remedies is that which subjects its instrumentalities, its ships particularly, to judgment. Personality is assigned to them and they are considered in pledge to indemnify any damage inflicted through them. They are made offenders and have the responsibility of offenders, and the remedy is suited to the purpose. In *Rounds v. Cloverport Foundry & Machine Co.*, 237 U. S. 303, 306, it is said, Mr. Justice Hughes delivering the opinion of the court, "The proceeding *in rem* which is within the exclusive jurisdiction of admiralty is one essentially against the vessel itself as the debtor or offending thing,—in which the vessel is itself 'seized and impleaded as the defendant, and is judged and sentenced accordingly.'"

In *The John G. Stevens*, 170 U. S. 113, 120, the court, through Mr. Justice Gray, declared, "The foundation of the rule that collision gives to the party injured a *jus in re* in the offending ship is the principle of the maritime law that the ship, by whomsoever owned or navigated, is considered as herself the wrongdoer, liable for the tort, and subject to a maritime lien for the damages. This principle, as has been observed by careful text writers on both

sides of the Atlantic, has been more clearly established, and more fully carried out, in this country than in England. Henry on Admiralty, §75, note; Marsden on Collisions (3d ed.) 93." The case in many ways and by many citations fortifies and illustrates the principle.[1]

The Siren was cited and the fact is pertinent as we shall presently see. *The China*, 7 Wall. 53, was also cited and quoted from. The quotation was repeated in *Ralli* v. *Troop*, 157 U. S. 386, 402, 403, where it is said that the liability of a vessel is not derived from the authority or agency of those on board, either under the civil or common law, "but upon a distinct principle of maritime law, namely, that the vessel, in whosesoever hands she lawfully is, is herself considered as the wrongdoer, liable for the tort, and subject to a maritime lien for the damages."

In *Tucker* v. *Alexandroff*, 183 U. S. 424, 438, this court by Mr. Justice Brown gave graphic representation to the same principle. He described a ship prior to her launching as "a mere congeries of wood and iron" but after launching she took on a name, a personality of her own and had in a sense volition, became competent to contract and be contracted with, sue and be sued, could have agents of her own, was capable of committing a tort and was pledged to its reparation. Cases were cited, *The Siren* among others.

The doctrine thus explicitly announced is denied application in the pending cases and upon what grounds? As I understand, the contention is that a vessel has not independent guilt, that there must be fault in its owner or

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[1] *General Mutual Insurance Co.* v. *Sherwood*, 14 How. 351, 363; *The Creole*, 2 Wall. Jr. 485, 518; *The Mayurka*, 2 Curtis, 72, 77; *The Young Mechanic*, 2 Curtis, 404; *The Kiersage*, 2 Curtis, 421; *The Yankee Blade*, 19 How. 82, 89; *The Rock Island Bridge*, 6 Wall. 213, 215; *The China*, 7 Wall. 53, 68; *The Siren*, 7 Wall. 152, 155; *The Lottawanna*, 21 Wall. 558, 579; *The J. E. Rumbell*, 148 U. S. 1, 10, 11, 20; *The Glide*, 167 U. S. 606.

operator, his fault becoming its fault. This has been said, but it puts out of view her character as bail and that the innocent victim of the injury she has inflicted shall not be remitted t the insufficient or evasive responsibility of persons but shall have the security of the tangible and available value of the thing. And this responsibility and fullness of indemnity we have seen it was declared in *The John G. Stevens, supra,* distinguished the law of this country from that of England.

But if the contention were conceded it would not determine these cases. I reject absolutely that because the Government is exempt from suit it cannot be accused of fault. Accountability for wrong is one thing, the wrong is another.

But I do not have to beat about in general reasoning. I may appeal to the authority of *The Siren,* 7 Wall. 152, and the cases that have approved and followed it. A gloss is attempted to be put upon it—which we think is unjustified and inaccurate unless indeed, it can be asserted that the writer of the opinion did not know the meaning of the words he used, and, that the members of the court who concurred with him, were equally deficient in understanding. And their insensibility to what the words conveyed had no excuse. A dissenting justice tried to bring their comprehensive import to understanding, proclaimed indeed, that the words had the extent and consequence that the court now says were not intended or accomplished.

The Siren, while in charge of a prize master and crew, having been taken in prize by the United States, ran into in the port of New York and sank the sloop Harper. The collision was regarded by the court as the fault of the Siren. She was condemned as prize and sold and the proceeds deposited with the Assistant Treasurer of the United States. The owners of the Harper asserted a claim upon her and her proceeds for the damages sus-

tained by the collision. The District Court rejected the claim. Its action was reversed by this court.

The United States was an actor in the case and this was regarded by the court, who spoke by Mr. Justice Field, as removing the impediment to the claim of the owners of the Harper. It was not, however, the basis of recovery. There was no confusion in the language or conception of the learned Justice, nor in the court, of that. By becoming the actor, the United States, it was said, waived its exemption from direct suit and opened "to consideration all claims and equities in regard to the property libelled"—not, of course, that the waiver of exemption created the "claims and equities". They, it was explicitly said, were created against the offending vessel by the collision. "In such case", the language was, "the claim exists equally as if the vessel belonged to a private citizen, but for reasons of public policy, already stated, cannot be enforced by direct proceedings against the vessel." And again, "The inability to enforce the claim against the vessel is not inconsistent with its existence."

The distinction was clearly made between exemption of the United States, the offence of the vessel and the existence of a claim against it in consequence of its offence. And the distinction was emphasized in the dissent of Mr. Justice Nelson. He was at pains to distinguish between liability to suit and legal liability for the act of injury, the ground of suit. And the basis of his dissent was the same as the basis of the opinion of the court in the present cases, but not so epigrammatically expressed. In the opinion in these cases it is said that "the United States has not consented to be sued for torts, and therefore it cannot be said that in a legal sense the United States has been guilty of a tort. For a tort is a tort in a legal sense only because the law has made it so."

Mr. Justice Nelson was more discursive. He said that "if the owner of the offending vessel [he regarded the Siren as owned by the United States] is not liable at all

for the collision, it follows, as a necessary legal consequence, that there can be no lien, otherwise the non-liability would amount to nothing." And again, "If the government is not responsible, upon the principles of the common law, for wrongs committed by her officers or agents, then, whether the proceedings in the admiralty are against the vessel, or its proceeds, the court is bound to dismiss them." And giving point to this view the learned Justice observed that "no principle at common law is better settled than that the government is not liable for the wrongful acts of her public agents."

I repeat, that in view of these extracts from Mr. Justice Nelson's dissent, misapprehension of its opinion by the court is not conceivable nor carelessness of utterance. Yet the opinion in the present cases practically so asserts and, in effect, regards Mr. Justice Nelson's dissent as the law of the Siren and not that which the court pronounced. The court decided that the vessel was the offending thing, and though it could not be reached in the hands of the Government, this "inability to enforce the claim against the vessel" was "not inconsistent with its existence."

The inevitable deduction is that in such situation the enforcement of a claim is suspended only, and when the vessel passes from the hands of the Government, as the offending vessels have in the cases at bar, they and "all claims and equities in regard to" them may be enforced.

The case was commented on in *The Davis*, 10 Wall. 15, 20, and the gloss now put upon it rejected. It is there said that the well supported doctrine of the case is "that proceedings *in rem* to enforce a lien against property of the United States are only forbidden in cases where, in order to sustain the proceeding, the possession of the United States must be invaded under process of the court."

So again in *Workman* v. *New York City*, 179 U. S. 552, where it is said, Chief Justice White delivering the opinion of the court, after an exhaustive review of cases, such as

he usually gave, " It results that, in the maritime law, the public nature of the service upon which a vessel is engaged at the time of the commission of a maritime tort affords no immunity from liability in a court of admiralty, where the court has jurisdiction." In view of this it is difficult to understand how it can be said that there was nothing that case decided contrary to the conclusion in these cases.

Against this array of cases and their reasoning, *Ex parte State of New York, No. 2*, 256 U. S. 503, and *Ex parte State of New York, No. 1*, 256 U. S. 490, are adduced. Neither case has militating force. The latter case decided nothing but that a State cannot be sued without its consent. An indisputable proposition which this court in its opinion had to clear from confusing or disturbing circumstances. In the former case, The Queen City, a steam tug, was in the possession and service of the State of New York and to have awarded process against it as the District Court did, would have arrested the service. This court rightfully reversed that action. The tug had not been released from that immunity as the vessels were in the pending cases.

Counsel for claimants in opposition to the petition cite cases at circuit and district which followed *The Siren*.[1]

[1] *The U. S. S. Hisko, U. S. S. Roanoke* and *U. S. S. Pocahontas* (Circuit Judge Manton, S. D. N. Y.) (March 17, 1921, unreported opinion annexed to brief);

The U. S. S. Newark (District Judge Knox, S. D. N. Y.) (March 18, 1921, unreported opinion annexed to brief);

The U. S. S. Sizaola (District Judge Mayer, S. D. N. Y.) (April 21, 1921, unreported opinion annexed to brief);

The F. J. Luckenbach, 267 Fed. 931; *The Liberty*, now before this court; *The Carolinian*, 270 Fed. 1011, also now before this court.

Also: *The Florence H.*, 248 Fed. 1012; *The Gloria*, 267 Fed. 929; *The City of Philadelphia*, 263 Fed. 234.

Counsel also cites: *The Tampico*, 16 Fed. 491; *Thompson Navigation Co.* v. *City of Chicago*, 79 Fed. 984; *Johnson Lighterage Co.*, 231 Fed. 365; *The Attualita*, 238 Fed. 909; *The Luigi*, 230 Fed. 493; *The Othello*, 5 Blatchf. 343.

It is not necessary to review or comment upon them. They are testimony of what the judiciary of the country considered and consider *The Siren* and other cases decided. Therefore we cannot refrain from saying that it is strange, that notwithstanding the language of *The Siren*, its understanding and acceptance in many cases in this court, the enforcement of its doctrine at circuit and district, it should now be declared erroneous. The cases at bar would seem to be cases for the application of the maxim of *stare decisis* which ought to have force enough to resist a change based on finesse of reasoning or attracted by the possible accomplishment of a theoretical correctness.

The rules should be discharged.